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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity, et al.,

Petitioners,

v.

BILLY RAY PHIFFER, an individual,

Respondent.

Petition for Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was Congress's purported abrogation of the States' Eleventh Amendment immunity from private damages claims brought under Title II of the Americans with Disabilities Act, and based on alleged disability discrimination and not on the deprivation of any fundamental right, a valid exercise of its authority under section 5 of the Fourteenth Amendment?

2. Was Congress's purported abrogation of the States' Eleventh Amendment immunity from private damages claims brought under Section 504 of the Rehabilitation Act a valid exercise of its authority under section 5 of the Fourteenth Amendment?

3. The Court has made it clear that State Eleventh Amendment immunity is constitutionally protected and that waivers of constitutionally protected rights must be knowing and voluntary. The Court also has noted, however, that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking actions that Congress could not otherwise require them to take, including, perhaps, waiving their Eleventh Amendment immunity. Under Section 504 of the Rehabilitation Act, Congress expressly has conditioned the States' acceptance of federal funds on the States' waiver of Eleventh Amendment immunity. For the waiver to be valid, must a State knowingly and voluntarily agree to waive, by its acceptance of federal funds, its constitutionally protected sovereign immunity, or is it sufficient that Congress clearly express its intent to require waiver as a condition for receipt of federal funds?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, two Oregon correctional facilities, the Columbia River Correctional Institution and the Santiam Correctional Institution, respectfully pray that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Phiffer v. Columbia River Correctional Inst.*, 384 F.3d 791 (9th Cir. 2004).[1]

OPINIONS BELOW

The district court's opinion and order was not reported and is attached to this petition. App. 6. This case has twice been before the Ninth Circuit. That court's latest decision was rendered after this Court granted the state petitioners' petition for certiorari, and vacated and remanded the case for further consideration in light of *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). *Columbia River Correctional Institute, et al. v. Phiffer,* ___ U.S. ___, 124 S. Ct. 2386, 158 L. Ed. 2d 960 (2004). This Court's memorandum decision, granting certiorari, and vacating and remanding, is attached to this petition. App. 22.

On remand, the Ninth Circuit simply "reissued [its] original disposition in per curiam form without further amendment," except for the addition of a concurring opinion authored by Judge O'Scannlain. *Phiffer v. Columbia River Correctional Inst.,* 384 F.3d at 792, 793. The court's per curiam

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[1] Consistent with plaintiff's complaint, the Ninth Circuit Court of Appeals case title identifies the two state correctional facilities as being "institutes." In fact, however, they are "institutions." *See, e.g.,* Or. Admin. R. 291-139-0015(2)(b)(A) (regarding inmate legal assistants in the various correctional institutions, including Columbia River and Santiam); Or. Admin. R. 291-139-0025(2) (regarding law libraries at the Columbia River and Santiam Correctional Institutions).

opinion and the concurring opinion are attached. App. 2, App. 4. The Ninth Circuit Court of Appeals' first decision in this case was not reported and it also is attached to this petition. App. 19.

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals' per curiam opinion was filed on September 13, 2004. It was amended on September 21, 2004 to add Judge O'Scannlain's concurring opinion. On December 7, 2004, Justice O'Connor granted petitioners an extension of time to file this petition for a writ of certiorari, to and including January 11, 2005. This petition is filed within the extension period granted by the Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Spending Clause empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." United States Constitution art. I, § 8, cl. 1.

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title II of the Americans with Disabilities Act of 1990 provides:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such dis-

> ability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Title II further provides:

> The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 U.S.C. § 12132].

42 U.S.C. § 12133.

Congress purported to abrogate the States' Eleventh Amendment immunity to damages claims brought under Title II as follows:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202

> The Rehabilitation Act provides in part that:
>
> (a) No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. § 706(8)], shall, solely by reason of his or her disability, be excluded from the participation in, be

> denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. * * *
>
> (b) For the purposes of this section, the term "program or activity" means all of the operations of —
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
>
> * * * * *
>
> any part of which is extended Federal financial assistance.

29 U.S.C. § 794. The Act further provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 U.S.C. § 794].

29 U.S.C. § 794a(2).

Congress purported to abrogate the States' Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a) as follows:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section

504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794] * * *.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

STATEMENT OF THE CASE

Plaintiff is a resident of Texas.[2] From July to November 1997 and from April to December 1998, plaintiff was incarcerated in Oregon's Santiam Correctional Institution. From 1997 to April 1998, he was incarcerated in Oregon's Columbia River Correctional Institution. While at Columbia River, plaintiff was enrolled in the Transitional Mental Health Program. In March 1998, he was transferred to the Pathfinders Program. He was required to attend the Pathfinders Program from March through December 1998, during which time he was returned to the Santiam facility. Both the Transitional Mental Health Program and the Pathfinders Program are funded, in whole or in part, by the federal government.

Plaintiff claims that, during his incarceration, he suffered from osteoarthritis and osteoporosis. The Pathfinders Program met for three hours a day, five days per week. As a result of his disability, plaintiff was unable to sit for that period of time. He asked corrections officials at both the Santiam and Columbia River facilities to return him to the Transitional Mental Health Program or, alternatively, for a reasonable ac-

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[2] This description of the facts is taken from plaintiff's complaint. Because the district court was ruling on the State's Motion for Judgment on the Pleadings, it accepted the plaintiff's allegations as true and drew all inferences in favor of the plaintiff. App. 7.

commodation of his disabilities. The corrections officials denied his requests. As a result, he allegedly suffered severe physical pain while enrolled in the Pathfinders Program. Plaintiff contends that the state defendants could have made reasonable modifications to allow him to participate in a program that would have accommodated his disabilities, but that they failed to do so. He also alleged that the defendants were deliberately indifferent to the strong likelihood that their action or inaction was in violation of his federally protected rights.

In his complaint, plaintiff asserted three claims, one brought under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, one brought under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and one alleging a claim of negligence under the state Tort Claims Act, Or. Rev. Stat. § 30.265. In their amended answer, the state defendants relied, in part, on a claim of Eleventh Amendment immunity to plaintiff's Title II and Section 504 claims. Subsequently, the defendants filed a motion for judgment on the pleadings, relying on the claim of Eleventh Amendment immunity.

The district court denied the state defendants' motion. The district court held that, "as a matter of current law in th[e] circuit, * * * Defendants are not immune from liability under Title II of the ADA pursuant to the Eleventh Amendment." App. 16. The court noted the Ninth Circuit's holding that "Congress acted pursuant to a valid exercise of power when it abrogated state immunity and held the Rehabilitation Act was 'validly enacted under the Fourteenth Amendment.'" App. 17. The court also concluded, based on the Ninth Circuit's case law, that "Defendants waived any immunity available to them under the Eleventh Amendment when they accepted federal funds to operate the[] [pertinent] state programs." App. 17.

For that reason, the court denied defendants' motion for judgment on plaintiff's Section 504 claims. App. 18.

The state defendants appealed. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (order denying motion to dismiss that is based on a claim of Eleventh Amendment immunity is subject to interlocutory appeal). On the merits of the state defendants' claim to immunity from suit brought under Title II of the ADA, the Ninth Circuit Court of Appeals acknowledged the State's "valiant attempt to persuade us that the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), requires us to revisit our precedent[.]" App. 20. But the court noted that it had "already done so and ha[d] already rejected the State's claim." App. 20, citing *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1171, *reh'g en banc denied* 294 F.3d 1166 (9th Cir. 2002), and *cert. dismissed* 538 U.S. 958 (2003); *Thomas v. Nakatani*, 309 F.3d 1203, 1209 (9th Cir. 2002); and *Lovell v. Chandler*, 303 F.3d 1039, 1050–51 (9th Cir. 2002), *cert. denied* 537 U.S. 1105 (2003). The court "decline[d] further review of [its] settled precedent." App. 21.

With regard to the state defendants' claim to immunity from suit based on Section 504 of the Rehabilitation Act, the Ninth Circuit held that its "precedent is clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds." App. 21, citing *Douglas v. Cal. Dept of Youth Auth.*, 271 F.3d 812, 820, *as amended*, 271 F.3d 910 (9th Cir. 2001), *reh'g en banc denied*, 285 F.3d 1226 (9th Cir. 2002). The court rejected the state defendants' argument that intervening precedent from this Court, specifically *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675–76 (1999), had "undermine[d]" the Ninth Circuit's "Eleventh Amendment waiver jurisprudence." App. 21.

"Once again," the court noted, it had "already addressed the issue, reaffirming our precedent that a State waives Eleventh Amendment immunity by accepting federal funds." App. 21, citing *Vinson v. Thomas,* 288 F.3d 1145, 1151 (9th Cir. 2002), *cert. denied sub nom Hawaii v. Vinson*, 537 U.S. 1104 (2003); *Lovell,* 303 F.3d at 1051. The Ninth Circuit thus affirmed the district court's decision and remanded. App. 21.

The state defendants filed a petition for certiorari in this Court. *Columbia River Correctional Institute, et al. v. Phiffer*, No. 03-279. In their petition, the defendants noted that this Court had granted certiorari in *Tennessee v. Lane* (02-1667), that the circuits were deeply divided over whether Congress had validly abrogated the States' sovereign immunity for claims for damages brought under Title II of the ADA, and that review in *Tennessee v. Lane* might provide the Court with the opportunity to resolve that circuit split, although "the opportunity to address the question ha[d previously] proved illusive." The state defendants also asked this Court to determine whether Congress's purported abrogation of the States' Eleventh Amendment immunity from damage claims brought under section 504 of the Rehabilitation Act was a valid exercise of its authority under section 5 of the Fourteenth Amendment, and to decide whether a State's waiver of its immunity when it accepts federal funds under section 504 must be knowing and voluntary to be effective.

As discussed in more detail below, *Tennessee v. Lane* did not decide the broader issue of whether Congress validly abrogated States' sovereign immunity to damage claims brought under Title II of the ADA. Instead, the Court decided a narrower issue, and "conclude[d] that Title II, *as it applies to the class of cases implicating the fundamental right of access to the courts,* constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." 541 U.S. at ___, 158 L. Ed. 2d at 844 (emphasis

added). Although *Lane* did not decide the Title II abrogation issue presented in this case, this Court granted the state defendants' petition for certiorari, and vacated and remanded to the Ninth Circuit "in light of" *Lane.* 158 L. Ed. 2d at 960.

On remand, and "[u]pon due consideration," the Ninth Circuit simply "conclude[d] that [its] initial resolution of this case is consistent with *Lane*'s holding, and [the court] reissue[d] [its] original disposition in per curiam form without further amendment." *Phiffer*, 384 F.3d at 792. Judge O'Scannlain concurred. Although he "agree[d] that circuit precedent control[led] the outcome of this case," he wrote "separately to stress that, even after *Tennessee v. Lane* * * *, a palpable tension continues to exist between [that] circuit's sovereign immunity jurisprudence and the Supreme Court's guidance on this issue." *Id.* at 793 (O'Scannlain, J., concurring) (citations omitted). Judge O'Scannlain described the discrepancy between this Court's "circumspect" and "exacting" analysis and the Ninth Circuit's refusal to engage in a "nuanced, case-by-case analysis."

> Although the Court held in *Lane* that Title II of the Americans with Disabilities Act validly abrogates state sovereign immunity in the context of courthouse access, that narrow holding was reached by a circumspect analysis that is significantly more exacting than that employed by our circuit in *Dare* [*v. California*, 191 F.3d 1167 (9th Cir. 1999), *cert. denied sub nom Cal. DMV v, Dare*, 531 U.S. 1190 (2001)] and *Clark* [*v. California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied sub nom Wilson v. Armstrong*, 524 U.S. 937 (1998)]. [*Lane*, 541] U.S. at ___, 124 S. Ct. at 1994. Indeed, the *Lane* Court placed significant emphasis upon the fact that courthouse access is a fundamental right that implicates not only disabled persons' entitlement to equal protection but also their due process

> rights and their rights under the First and Sixth Amendments. *See id.* at 1988. It is therefore open to question whether Title II validly abrogates state sovereign immunity where no such fundamental right is at issue. *See id.* at 1994 n. 20. A State may well retain its Eleventh Amendment immunity where a plaintiff premises a Title II claim solely upon an alleged equal protection violation and has not suffered the deprivation of any other constitutional right. Because *Dare* and *Clark* upheld the entirety of Title II without engaging in the nuanced, case-by-case analysis demanded by *Lane*, their continued vitality is uncertain. In the absence of en banc review, however, I acknowledge that these decisions remain binding on this panel and thus join in the per curiam opinion.

384 F.3d at 793 (O'Scannlain, J., concurring).

REASONS FOR GRANTING THE WRIT

Review is warranted in this case because the circuits are split on each of the three questions presented and because, with respect to the first issue, *Lane* has done nothing to mend or repair the split. Moreover, each question raises significant issues concerning the States' sovereign immunity and the ability of Congress to abrogate or force a waiver of that immunity.

I. The circuits are split over whether Congress validly abrogated the States' sovereign immunity to damage claims brought under Title II of the ADA; *Tennessee v. Lane* did not resolve that issue except with regard to claims based on certain fundamental rights, such as access to courts; and thus the circuit split remains every bit as wide after *Lane*, as it was before.

Before *Lane*, the circuits were deeply divided over whether Congress in Title II of the ADA validly abrogated the

States' immunity to claims for monetary damages. Four circuits, the Fourth, Fifth, Eighth and Tenth, had held as a general matter that there was no valid abrogation. *Wessel v. Glendening*, 306 F.3d 203 (4th Cir. 2002); *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 1077 (2002); *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001); *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), *cert. dismissed* 529 U.S. 1001 (2000). The Ninth Circuit had reached the opposite conclusion. *Hason v. Medical Bd. of California*, 279 F.3d 1167, *reh'g en banc denied*, 294 F.3d 1166 (9th Cir.2002), *cert. dismissed* 538 U.S. 958 (2003).

Two other circuits had rendered less categorical decisions. The Sixth Circuit, in a decision that at least in some respects presaged this Court's decision in *Lane*, held that the States' Eleventh Amendment immunity was validly abrogated in the context of fundamental, due-process-based claims, but not with regard to equal-protection-based claims. *Popovich v. Cuyahoga County Ct. of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (*en banc*), *cert. denied*, 537 U.S. 812 (2002). The Second Circuit developed an analysis that depended on the state actor's purpose or state of mind. *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001) (abrogation valid only as to cases where Title II violation was motivated by discriminatory animus or ill will directed at disability).

In *Lane*, this Court granted certiorari on the broad question of "[w]hether Title II of the Americans with Disabilities Act * * * exceeds Congress's authority under section 5 of the Fourteenth Amendment, thereby failing to abrogate the states' Eleventh Amendment immunity from private damage claims." The Court answered a narrower question, however, determining that "Title II, *as it applies to the class of cases implicating the fundamental right of access to the courts*, con-

stitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." 158 L. Ed. 2d at 844 (emphasis added). In reaching that decision, the Court relied on the fact that "Title II, like Title I, seeks to enforce [a] prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Id.* at 836–37 (citations omitted). "These rights include some, like the right of access to the courts at issue in th[at] case, that are protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 837. With regard to the right of access to the courts, "Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing" that right. *Id.* at 842. The decision in *Lane* is, thus, a narrow one. The Court declined to "consider Title II, with its wide variety of applications, as an undifferentiated whole." *Id.* at 841 (footnote omitted).

Courts that have considered Title II sovereign immunity issues after *Lane* have remarked on the limited focus of that decision and have held that it does not apply to what might be seen as more garden-variety, disability discrimination claims brought under Title II. *See Miller v. King,* 384 F.3d 1248, 1273 (11th Cir. 2004) ("what makes this case radically different from *Lane* is the limited nature of the [Eighth Amendment] constitutional right at issue and how Title II, as applied to prisons, would substantively and materially rewrite the Eighth Amendment"); *Badillo-Santiago v. Naveira-Merly,* 378 F.3d 1, 5 (1st Cir. 2004) (*Lane* applies only to "certain constitutionally-based claims under Title II of the ADA, on an as-applied basis"); *Haas v. Quest Recovery Services, Inc.,* 338 F. Supp. 2d 797, 801 (N.D. Ohio 2004) (in *Lane,* this Court "made clear that the decision only addressed the right of access to the courts, and not any other application of Title II").

The one exception to the general rule that *Lane* did not alter the previous circuit split is that most, but not all, courts that have considered the continuing viability of the Sixth Circuit's *Garcia* approach -- which depends upon the state of mind or purpose of the state actor -- have held that approach does not survive *Lane*. *Compare Johnson v. Southern Conn. St. Univ.*, 2004 US Dist LEXIS 21084, *11 (D. Conn. 2004) (after *Lane*, there is "no longer any basis to find the existence of a cause of action under Title II where no * * * fundamental right is implicated and the sole justification is the defendant's level of scienter"); *Roe v. Johnson*, 334 F. Supp. 2d 415, 421 n. 9 (S.D. NY 2004) (same), with *Degrafinreid v. Ricks*, 2004 US Dist LEXIS 24448, *17–18 (S.D. NY 2004) (*Lane* did not repudiate or alter *Garcia* analysis).

Thus, *Lane* did little, if anything, to mend the circuit split regarding whether Congress validly abrogated States' sovereign immunity to damage claims brought under Title II when a right other than a fundamental right, like access to courts, is involved. The circuit split persists and is just as wide when claims are based, as they often are, on disability discrimination *per se* and not on any fundamental right.[3] Moreover, because *Lane* does not appear to alter the analysis that applies outside the context of certain fundamental rights, there is no reason to believe that the passage of time and further consideration of the decision in *Lane* will do anything to resolve the circuit split. *Lane* simply does not bear on the broader issue of whether States are immune to damage claims brought under Title II that depend on equal-protection claims of disability discrimination. That broad and significant issue, that contin-

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[3] In this case, respondent's claims are that petitioners unlawfully discriminated against him on the basis of his disability. In his complaint, he does not rely on any fundamental right.

ues to divide the circuits, warrants a grant of certiorari here, just as it did when this Court granted certiorari in *Lane*.

II. The circuits also are divided over whether Congress properly abrogated the States' sovereign immunity to damage claims brought under Section 504 of the Rehabilitation Act.

The Court has refined the analysis that applies when determining whether Congress has validly abrogated the States' Eleventh Amendment immunity to claims for damages. Before *Lane,* the Court's most detailed description of the review that is required was found in *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001). Except to the extent that it focuses more precisely on the constitutional right that is at issue, the analytical approach used in *Lane* does not represent a departure. 158 L. Ed. 2d at 835–44 (applying analysis outlined in *Garrett* and *City of Boerne v. Flores*, 521 U.S. 507 (1997)). In *Lane,* the Court reiterated that Congress may abrogate the States' Eleventh Amendment immunity only when it "unequivocally expresse[s] its intent to abrogate that immunity" and when "'Congress act[s] pursuant to a valid grant of constitutional authority.'" *Id.* at 833, quoting *Kimel v. Board of Regents,* 528 U.S. 62, 73 (2000). *See also Garrett,* 531 U.S. at 363. In *Garrett*, the Court "held that 'the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.'" *Garrett*, 531 U.S. at 364, quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). *Lane* cites the same passage from *Fitzpatrick.* 158 L. Ed. 2d at 833.

In *Lane,* as in *Garrett,* the first step in determining whether Congress validly exercised its authority under section 5 of the Fourteenth Amendment is "to identify the constitutional right or rights that Congress sought to enforce when it enacted Title II." *Id.* at 836, citing *Garrett*, 531 U.S. at 365.

"Once * * * the metes and bounds of the constitutional right in question" have been determined, the next task is to "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States against the disabled." *Id.* at 368. Even if the legislative history shows "a pattern of discrimination by the States which violates the Fourteenth Amendment," "the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Id.* at 374. *See also Lane*, 158 L. Ed. 2d at 835 ("Section 5 legislation is valid if it exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'" quoting *City of Boerne*, 521 U.S. at 520).

Not all of the circuits have applied this type of analysis to the question of Congress's authority to abrogate the States' sovereign immunity to claims brought under Section 504 of the Rehabilitation Act. Perhaps as a result, the circuits have reached conflicting conclusions. Most circuits that have addressed the question have found that the purported abrogation exceeds Congress's authority under section 5 of the Fourteenth Amendment. In a pre-*Lane*, pre-*Garrett* case, the Ninth Circuit concluded to the contrary and upheld the abrogation as within Congress's authority. Following *Garrett*, and in this case, following *Lane,* the Ninth Circuit has refused to revisit its prior conclusion, creating a conflict between the circuits that have ruled on the issue.[4] Like the question of Congress's authority to abrogate the States' sovereign immunity to claims brought under Title II of the ADA, the similar question as to claims arising under Section 504 of the Rehabilitation Act is

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[4] Other circuits have found it unnecessary to address this question, because they have concluded that the States waived any immunity they may have had by accepting federal funds, as discussed more fully in the next section.

important and requires this Court's attention to resolve the conflict between the circuits. And, as with the Title II issue, *Lane* has done nothing to resolve the issue or mend the conflict.

The Second, Fifth, Seventh, Eighth and Tenth Circuits have concluded that Congress lacked the authority to abrogate the States' sovereign immunity from claims brought under Section 504 of the Rehabilitation Act. In *Garcia,* the Second Circuit held that Section 504, like Title II of the ADA, exceeds Congress's authority under section 5 of the Fourteenth Amendment. Both provisions fail the requirement that remedies be congruent and proportional to the constitutional violations Congress sought to remedy or deter; both impermissibly shift the burden of proof onto the state to defend the absence of an accommodation that would presumptively be permissible under the Fourteenth Amendment; both require states to eradicate disparate effects divorced from any inquiry into intent. 280 F.3d at 109–110, 113. The court nevertheless concluded that Title II could constitutionally apply to claims alleging violations motivated by discriminatory animus or ill will based on the plaintiff's disability, *Id.* at 111, and that Section 504 could constitutionally apply to claims alleging deliberate indifference to the rights secured to the disabled by the act, *Id.* at 115.[5]

The Fifth Circuit similarly held that Title II of the ADA exceeded Congress's authority to abrogate States' sovereign immunity, and applied the same analysis to Section 504. *Reickenbacker v. Foster*, 274 F.3d at 977 n 17, 982–83. For Section 504, the court concluded that Congress failed to iden-

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[5] As noted above, the Second Circuit's focus on scienter may be suspect following *Lane,* which takes a more rights-based approach. The lack of congruence and proportionality and the shift in the burden of proof remain valid rationales, however.

tify a history and pattern of unconstitutional discrimination by the States against the disabled and that the provision imposed obligations on the States to make accommodations that exceed constitutional boundaries. *Id.*

In *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000), the Seventh Circuit concluded, with little analysis, that Congress lacked the authority to abrogate the States' sovereign immunity because the ADA rests on the Commerce Clause and the ADA and Rehabilitation Act are identical for purposes of § 5.

The Eighth Circuit reviewed the legislative history of Section 504 and found "little indication that Congress properly identified constitutional transgressions it sought to remedy by enacting § 504. In fact, the legislative history is largely silent regarding the reason § 504 was included in the [Rehabilitation Act]." *Bradley v. Arkansas Dept. of Educ.*, 189 F.3d 745, 755 (8th Cir. 1999).[6] "Similarly, the legislative history of the abrogation provision does not identify constitutional transgressions that make such a provision appropriate. The legislative history of § 2000d–7 instead reveals only that Congress sought to override the Supreme Court's decision in *Atascadero* by providing an unequivocal expression of Congress's intent to abrogate the states' immunity." *Id.* at 756.

The Tenth Circuit reviewed the legislative record for both Title II of the ADA and Section 504 and found "some evidence * * * that unconstitutional discrimination against the

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[6] The court initially ruled that there was no waiver of immunity because the conditions Congress placed on a State's receipt of federal funds were too broad and therefore coercive. *Bradley*, 189 F.3d at 758. The court reheard that portion of the decision en banc and vacated only that portion of the decision, leaving intact its ruling on the abrogation of sovereign immunity. *Jim C. v. U.S.*, 235 F.3d 1079, 1080 (8th Cir. 2000), *cert. denied sub nom Arkansas Dept. of Education v. Jim C.*, 544 U.S. 949 (2001).

disabled exists in government 'services, programs, or activities.'" *Thompson v. Colorado*, 278 F.3d at 1033. However, the court concluded, "most of those occurrences involve local officials and not the states." *Id.* In addition, many of the examples did not rise to the level of unconstitutional discrimination. *Id.* at 1033–34. As a result of its review, the court concluded that Congress lacked the authority to abrogate the States' sovereign immunity.[7] *See also* Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After Garrett*, 28 J.C. & U.L. 41, 89 n. 272 (2001) ("There is no reason to believe that the Rehabilitation Act's legislative history better supports a pattern of state employment discrimination than does that of the ADA Title I.").

The Ninth Circuit stands apart from the other circuits in its refusal to view *Garrett* and its predecessors as setting out the analysis courts must follow when resolving questions of Congress's authority to abrogate States' sovereign immunity. Prior to *Garrett*, the Ninth Circuit rejected Eleventh Amendment immunity claims in both Title II and Section 504 cases. *Dare,* 191 F.3d at 1173–75 (no Eleventh Amendment immunity as to Title II claim); *Clark,* 123 F.3d at 1270 (Eleventh

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[7] Admittedly, the Tenth Circuit's review of the legislative history underlying Title II of the ADA may be in some tension with this Court's review of that history in *Lane.* In that case, this Court noted "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services[.]" 158 L. Ed. 2d at 840. There is some uncertainty in the lower courts as to whether this Court has decided as a matter of law that the legislative record is sufficient as to all public services and programs, or only some, such as access to courthouses and courts. *Miller,* 384 F.3d at 1271 n. 25 (doubting adequacy of record of "a history and pattern of disability discrimination in prisons recited in *Lane*," but nonetheless treating the matter as having been settled in that case).

Amendment does not bar Title II or Section 504 claims). In none of those cases did the Ninth Circuit undertake the kind of review this Court prescribed in *Garrett*. Following *Garrett* and *Lane*, the Ninth Circuit simply adhered to its prior decisions and brushed aside the State's argument that this Court's decisions require a more detailed review of state assertions of Eleventh Amendment immunity to claims brought under Title II and Section 504. See App. 3 ("[A]lthough the State makes a valiant attempt to persuade us that * * * *Garrett* * * * requires us to revisit our precedent, we have already done so and have already rejected the State's claims. * * * We decline further review of our settled precedent."); *see also Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003) (court refused to re-examine its prior holdings regarding the State's sovereign immunity to Title II and Section 504 claims).

For two reasons it is important for this Court to resolve the split between the circuits on the Section 504 immunity issue. First, there is no reason why States in the Ninth Circuit should have less ability to exercise their sovereign immunity than States in the other circuits. Second, the Court should make it clear that the Ninth Circuit should not be free to disregard and fail to apply the analysis that this Court has determined is applicable. As Judge O'Scannlain noted on remand in this case, in the area of Eleventh Amendment immunity, the Ninth Circuit persists in failing to undertake the "more exacting" analysis called for by this Court's case law. *Phiffer*, 384 F.3d at 793.

III. The circuits are split on the effect of Congress's purported waiver, under the Spending Clause power, of State sovereign immunity to Section 504 claims—a split that appears to be based on a conflict between two competing constitutional provisions.

Determining whether a State retains its sovereign immunity to Section 504 claims, after it accepts federal funds,

brings into play two constitutional provisions—the Spending Clause and the Eleventh Amendment. "Each doctrine pulls [a court] in an opposite direction." *Douglas v. California Dept. of Youth Auth.*, 285 F.3d at 1226 (O'Scannlain, J., dissenting from the denial of rehearing en banc). The tension -- which has resulted in a split between the circuits -- arises from the fact that Spending Clause analysis appears to be concerned only with the clear expression of Congress's intent, while Eleventh Amendment analysis looks closely at what the State has done, refusing to lightly imply a waiver of sovereign immunity and necessitating a knowing and intentional waiver of the State's sovereign immunity.

This Court's statements regarding the two provisions have drawn courts in opposite directions and, thus, appear to have led, at least in part, to the circuit split. As explained below, those circuits that have treated the Rehabilitation Act as a condition imposed pursuant to Congress's Spending Clause authority have concluded that the waiver of immunity is a valid condition attached to receipt of federal funds. In contrast, those circuits that have viewed the issue through the lens of this Court's Eleventh Amendment sovereign immunity jurisprudence have asked instead whether States have knowingly and voluntarily waived their immunity. The contrast – and the tension – is between an analysis that focuses on Congress's intent and one that concentrates instead on the knowing and voluntary nature of the State's purported waiver.

Before describing the split among the circuits, it is important to compare what this Court has said about Congress's spending power authority with the Court's decisions regarding waiver of Eleventh Amendment immunity. Under the Court's approach to the Spending Clause of Article I, Congress has great leeway to place conditions on the funding it gives to the States. "[O]bjectives not thought to be within Article I's 'enumerated legislative fields,' * * * may neverthe-

less be attained through the use of the spending power and the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), quoting *United States v. Butler*, 297 U.S. 1, 65 (1936).

The Court has identified four limitations on the spending power. First, "[t]he exercise of the spending power must be in pursuit of 'the general welfare[,]'" but courts are to "defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207, quoting *Helvering v. Davis*, 301 U.S. 619, 640–41, 645 (1937). Second, if Congress intends to place a condition on the States' receipt of federal funds, it "must do so unambiguously * * *, enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207, quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Third, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Dole*, 483 U.S. at 207, quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion). Finally, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds," but "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *Dole*, 483 U.S. at 208, 209 (citations omitted).

In addition to those limitations, Congress may not "induce the States to engage in activities that would themselves be unconstitutional," and "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 210, 211, quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

As discussed below, some circuits have viewed the waiver of Eleventh Amendment immunity to Section 504 claims as a

condition Congress validly has placed on the receipt of federal funds under its spending power authority. In contrast to those decisions, other circuits have focused on the Court's statements regarding Eleventh Amendment immunity in *College Sav. Bank v. Fla. Prepaid Post-secondary Educ. Expense Bd.*, 527 U.S. 666 (1999), leading to a very different analysis of the waiver of immunity for Section 504 claims, and a different result.

In *College Savings Bank*, the Court reiterated that, although a State may waive its sovereign immunity, the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" 527 U.S. at 675, quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985). A State's waiver of immunity must be express and unequivocal, and the Court rejected the idea of a constructive waiver of immunity.

> The whole point of requiring a "clear declaration" *by the State* of its waiver is to be certain that the State in fact consents to suit. * * * There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that *the State* made an "altogether voluntary" decision to waive its immunity.

College Savings Bank, 527 U.S. at 680–81, quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (emphasis in original).

The Court noted that sovereign immunity is constitutionally protected and that waivers of constitutional rights are effective only if the waiver is a knowing and voluntary one. Invoking the "classic description of an effective waiver of a constitutional right [a]s the 'intentional relinquishment or abandonment of a known right or privilege[,]' *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)," the Court emphasized that "every reasonable presumption against waiver" must be applied. *College Savings,* 527 U.S. at 682 (internal quotation marks and additional citations omitted). "State sovereign immunity * * * is constitutionally protected." *Id.* (citations omitted). "And in the context of *federal* sovereign immunity -- obviously the closest analogy * * * -- it is well established that waivers are not implied." *Id.* (emphasis in original; citation omitted). This Court saw "no reason why the rule should be different with respect to state sovereign immunity." *Id.*

The Court also recognized that "congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe* [*of Fla. v. Florida*, 517 U.S. 44 (1996)]." *Id.* at 683. Thus, "[f]orced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin." *Id.*

Although the Court in *College Savings Bank* appears to have endorsed an analysis (later adopted by the Second and Fifth Circuits) that focuses on whether a State has knowingly and voluntarily waived its immunity, the decision did not resolve the issue presented here. The Court left open the door for the analysis followed by some other circuits, which have viewed the waiver instead simply as a condition imposed pursuant to Congress's spending power. The Court recognized Congress's authority, "in the exercise of its spending power, to condition its grant of funds to the States upon their taking

certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions," but the Court concluded that the case was "fundamentally different." That was because "what Congress threaten[ed] if the State refuses to agree to its conditions is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity." *Id.* at 686–87. "[W]here the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed – and the voluntariness of waiver destroyed – *when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity*." *Id.* (emphasis added).

This case presents the issue left open in *College Savings Bank* and that appears to have resulted in the split between the circuits: when Congress conditions the acceptance of federal funds on the State's waiver of sovereign immunity, is that action reviewed solely as a condition imposed under Congress's spending power or as the waiver of a constitutional right that must be knowing, voluntary and unequivocal? The differing approaches to that question appear to have dictated the differing conclusions reached by the various circuits as they have struggled to resolve the issue.

The Ninth Circuit has viewed the waiver in the Rehabilitation Act simply as an exercise of Congress's spending power.

> One way for a state to waive its immunity is to accept federal funds where the funding statute "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity."

Clark, 123 F.3d at 1271. Because Congress made its intent clear, the Ninth Circuit concluded that the waiver requirement was valid. *Id.*[8]

In an earlier case, in a dissent to the court's denial of a suggestion for rehearing this issue en banc, Judge O'Scannlain (joined by three of his colleagues) identified the tension between Spending Clause and Eleventh Amendment analysis as a critical issue that the Ninth Circuit (and other courts) have failed to address:

> Courts which must decide whether a State retains its sovereign immunity after accepting conditioned federal funds are caught between two competing lines of jurisprudence. Under the Supreme Court's approach to the Spending Clause of Article I, Congress has great leeway to place conditions on the funding it gives to the states. * * * Yet, under the Supreme Court's Eleventh Amendment sovereign immunity jurisprudence, Congress's ability to place affirmative obligations on the States using its Fourteenth Amendment enforcement power is rapidly diminishing. * * * Each doctrine pulls us in an opposite direction.

Douglas, 285 F.3d at 1226 (footnote omitted) (O'Scannlain, J., dissenting). Judge O'Scannlain identified the tension between the two doctrines as being between the requirement that a State's waiver of its sovereign immunity must be made clearly and voluntarily, with a stringent test for finding a waiver, and the countervailing doctrine that Congress may "condition its grant of funds to the States, even by requiring

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[8] In this case, the Ninth Circuit merely reiterated its prior holding in *Clark* that the State waives its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act when it accepts federal funds. App. 3-4.

States to take actions that Congress could not directly require them to take, such as waiving their sovereign immunity." *Id.* at 1228–29, relying on *College Savings Bank* for both propositions.[9]

In contrast to the approach used by the *Douglas* dissent, the Eighth Circuit relied on an analysis similar to that employed by the Ninth Circuit majority in holding that receipt of federal funds waives any immunity to Section 504 claims. *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000), *cert. denied sub nom Arkansas Dept. of Education v. Jim C.*, 544 U.S. 949 (2001). The court cited *College Savings Bank*, but only for the proposition that "Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds,

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[9] The tension between Spending Clause analysis and the requirement of a knowing and voluntary waiver of State sovereign immunity also appears to lead to a related division amongst lower courts. When determining whether a state program amounts to a "program or activity receiving Federal financial assistance," under the terms of the Rehabilitation Act, 29 U.S.C. § 794(1)(a), (b)(1)(A), (B), some courts require that the instrumentality of the State to which federal assistance is extended be in a position to accept or reject the federal funds, while others do not. *See Bartlett v. New York State Bd. of Law Examiners,* 156 F.3d 321, 330 (2nd Cir 1998) (determining that there is no such requirement, and distinguishing *U.S. Dept. of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 606 (1986)); Annotation, "Who Is Recipient of, and What Constitutes Program or Activity Receiving, Federal Financial Assistance for Purposes of § 504 of the Rehabilitation Act," 160 ALR Fed 297, §§ 10, 11 (2000) (collecting and contrasting cases requiring that State recipient have power to accept or reject federal money, with those which focus instead on Congress's intent that a particular entity receive federal assistance). Again, the tension lies between whether it is Congress's intent that is pivotal or whether instead it is the knowing and voluntary nature of the State's waiver that is determinative.

even though Congress could not order the waiver directly." *Id.* at 1081. The court then relied on the language in *Dole* that "'Congress may attach conditions on the receipt of federal funds.'" *Id.* at 1081, quoting *Dole*, 483 U.S. at 206. The court noted that "[t]o avoid the effect of Section 504" on the state department of education, "the State would be required to sacrifice federal funds only for that department." That "requirement," the court concluded, was "comparable to the ordinary *quid pro quo* that the Supreme Court has repeatedly approved: the State is offered federal funds for some activities, but, in return, it is required to meet certain federal requirements in carrying out those activities." "The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice." *Id.* at 1081–82.

The dissent in *Jim C.* criticized the majority for permitting Congress to "achieve indirectly what it cannot constitutionally achieve directly" by an abrogation of the State's immunity. *Id.* at 1082–83 (Bowman, J., dissenting). The dissent concluded that the condition imposed with respect to Rehabilitation Act claims "bears no direct relationship (indeed, not even a discernible relationship) to the purpose of most federal grants to the states for education." *Id.* at 1084. Therefore, it exceeds what Congress may permissibly exact in exchange for federal funds.

The Third Circuit also found the waiver to be effective, looking only at whether Congress, in amending the Rehabilitation Act, made it clear that accepting federal funds results in a waiver of Eleventh Amendment immunity. *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 170 (3rd Cir. 2002) *cert. denied sub nom Pennsylvania Dept. of Corrections v. Koslow*, 537 U.S. 1232 (2003). The court concluded that "where a state participates in a federal financial assistance

program 'in light of the existing state of the law,' the state is charged with awareness that accepting federal funds can result in the waiver of Eleventh Amendment immunity." *Id.* at 172, quoting *Edelman v. Jordan*, 415 U.S. 651, 687 (1974). The Tenth, Eleventh, and District of Columbia Circuits have reached similar decisions based on similar analyses. *Robinson v. Kansas*, 295 F.3d 1183, 1189–90 (10th Cir. 2002), *cert. denied sub nom Kansas v. Robinson*, 537 U.S. 1232 (2003); *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *reversed on other grounds, Alexander v. Sandoval*, 532 U.S. 275 (2001); *Barbour v. Washington Metropolitan Transit Auth.*, 374 F.3d 1161 (D.C. Cir. 2004).[10] The court's decision in *Barbour* goes so far as to locate the State's "clear declaration" of its waiver of sovereign immunity solely in Congress's "clear intent to condition participation" in federally funded programs "on a State's consent to waive its constitutional immunity." 374 F.3d at 1163 (internal quotation marks and citation omitted). The court thus conflates completely the clear expression of Congress's intent with a State's intent to waive its sovereign immunity.

Other circuits, however, have focused instead on this Court's emphatic language in *College Savings Bank* that State sovereign immunity is a constitutional right that, like other constitutional rights, can be waived only if the waiver is knowing and voluntary. In *Garcia,* the Second Circuit relied on *College Savings Bank* in reaching its conclusion that the waiver imposed on the receipt of federal funds under Section 504 of the Rehabilitation Act can be valid only if the state "has made a knowing and intentional waiver[.]" 280 F.3d at 114. The Second Circuit criticized the decisions of its sister

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[10] In *Barbour,* the Transit Authority has filed a petition for certiorari, which is pending in this Court. *Washington Metropolitan Transit Authority v. Barbour,* No. 04-748.

circuits as being "unpersuasive because they focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received the funds." *Id.* at 115 n. 5. "None of these cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful as the Supreme Court required in *College Savings Bank*, 527 U.S. at 682." *Id.*

A panel of the Fifth Circuit took a similar approach in its analysis of the question. Although it recognized that Congress enacted the conditional waiver provision pursuant to its spending power, it, too, required that the State's waiver be knowing and voluntary. *Pace v. Bogalusa City School Board*, 325 F.3d 609, 615–16, *rehearing en banc allowed*, 339 F.3d 348 (5th Cir. 2003). In *Miller v. Texas Tech University Health Sciences Center*, 330 F.3d 691, *rehearing en banc allowed* 342 F.3d 563 (5th Cir. 2003), the court clarified its view of the relationship between conditions imposed under Congress's spending power and waivers of sovereign immunity. It identified "two inquiries" it must make "in determining whether a state has waived its sovereign immunity by accepting federal funds." *Id.* at 694. The first is whether Congress manifested its clear intent to condition participation on a State's waiver of its constitutional immunity. *Id.* The second is whether the state knowingly and voluntarily intended to waive its immunity by accepting funds. *Id.* Although the two inquiries sometimes may overlap, a waiver of a state's sovereign immunity must be a waiver of a known right and every reasonable presumption against a finding of a waiver must be made. *Id.*

Thus, the majority of circuits have focused solely on this Court's statements regarding Congress's authority under the spending power to place conditions on the receipt of federal funds. That approach gives too little regard to the constitu-

tional basis of State sovereign immunity and this Court's equally clear statements that the unequivocal expression of Congress's intent cannot serve as a State's unequivocal, knowing and voluntary expression that it is waiving its sovereign immunity. This case presents the Court with the opportunity to answer an important question that divides the federal circuits and that is of great significance to the States, as well as the federal government.

CONCLUSION

For the reasons discussed above, petitioners respectfully request that this Court grant the petition for writ of certiorari and reverse the decision of the court below.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY RAY PHIFFER, an individual,

Plaintiff-Appellee,

v.

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity; SANTIAM CORRECTIONAL INSTITUTE, a State of Oregon public entity,

Defendants-Appellants.

No. 01-35984

D.C. No. CV-01-01652-AJB

ORDER AND AMENDED OPINION

On Remand from the United States Supreme Court

Resubmitted September 3, 2004

Filed September 13, 2004

Amended September 21, 2004

Before: Diarmuid F. O'Scannlain, Ferdinand F. Fernandez, and Raymond C. Fisher, Circuit Judges.

Per Curiam Opinion;

Concurrence by Judge O'Scannlain

SUMMARY

Civil Litigation and Procedure/Appeals

The court of appeals affirmed a judgment of the district court. The court held that it does not require a showing in an interlocutory appeal of Eleventh Amendment immunity that the appeal involves a serious and unsettled question of law. Judge O'Scannlain concurred, writing that it is open to question whether Title II validly abrogates state sovereign immunity where no fundamental right is at issue.

COUNSEL

Janet A. Metcalf, Assistant Attorney General, State of Oregon, for the defendants-appellants.

Dawna F. Scott, Lake Oswego, Oregon, for the plaintiff-appellee.

ORDER

The per curiam opinion filed on September 13, 2004, is amended to include a concurrence by Judge O'Scannlain.

OPINION

PER CURIAM:

On April 21, 2003, we filed a memorandum in this case. 63 Fed. Appx. 335 (9th Cir.2003). The Supreme Court granted certiorari, 124 S. Ct. 2386 (2004), and vacated and remanded for further consideration in light of *Tennessee v. Lane*, 124 S. Ct. 1978 (2004). Upon due consideration, we conclude that our initial resolution of this case is consistent with *Lane's*

holding, and we reissue our original disposition in per curiam form without further amendment.

I

The State appeals the district court's denial of its motion for judgment on the pleadings based on Eleventh Amendment sovereign immunity. The facts and prior proceedings are known to the parties, and are restated herein only as necessary.

II

The denial of a state's motion for judgment on the pleadings on the grounds of Eleventh Amendment immunity is an interlocutory appeal and need not await final judgment. *See Clark v. California*, 123 F.3d 1267, 1269 (9th Cir. 1997) ("This court has jurisdiction to hear an interlocutory appeal from an order denying a state's motion to dismiss on the ground of immunity under the Eleventh Amendment." (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993))). The Respondent contends, however, that we must look at each case to determine whether the appeal involves a "serious and unsettled question of law." We disagree. We have never required such a showing for an interlocutory appeal of Eleventh Amendment immunity, *see, e.g., Thomas v. Nakatani*, 309 F.3d 1203, 1206-07 (9th Cir. 2002), nor has the Supreme Court, *see e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and we decline to require such a showing at this time. Accordingly, we have jurisdiction over the State's appeal.

Our precedent clearly commands the conclusion that the State is not entitled to Eleventh Amendment immunity under Title II of the ADA. *See, e.g., Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999); *Clark*, 123 F.3d at 1270. And, although the State makes a valiant attempt to persuade us that the Supreme Court's decision in *Board of Trustees of the Uni-*

versity of Alabama v. Garrett, 531 U.S. 356 (2001), requires us to revisit our precedent, we have already done so and have already rejected the State's claims. *See Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1171, *reh'g en banc denied* 294 F.3d 1166 (9th Cir. 2002), *and cert. dismissed* 2003 WL 1792116 (U.S. April 7, 2003) (No. 02-479); *Thomas v. Nakatani*, 309 F.3d 1203, 1209 (9th Cir. 2002) (stating that *Hason* reaffirmed *Clark's* and *Dare's* holding that Congress abrogated sovereign immunity under Title II); *Lovell v. Chandler*, 303 F.3d 1039, 1050-51 (9th Cir. 2002) (same). We decline further review of our settled precedent.

Likewise, our precedent is clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds. *See, e.g., Douglas v. Cal. Dep't of Youth Auth., 271 F.3d 812, 820, as amended,* 271 F.3d 910 (9th Cir. 2001), *and reh'g en banc denied,* 285 F.3d 1226 (9th Cir. 2002). Again, the State points to "intervening Supreme Court precedent," this time *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675-76 (1999), which it contends undermines our Eleventh Amendment waiver jurisprudence. Once again, we have already addressed the issue, reaffirming our precedent that a State waives Eleventh Amendment immunity by accepting federal funds. *Vinson v. Thomas,* 288 F.3d 1145, 1151 (9th Cir. 2002) (reaffirming *Douglas's* holding that by accepting federal funds, a state waives its sovereign immunity); *Lovell*, 303 F.3d at 1051 (same). We find the State's claims without merit.

AFFIRMED and REMANDED.

O'SCANNLAIN, Circuit Judge, concurring:

I agree that circuit precedent controls the outcome of this case. *See Dare v. California,* 191 F.3d 1167 (9th Cir. 1999);

Clark v. Woods, 123 F.3d 1267 (9th Cir. 1997). I nevertheless write separately to stress that, even after *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), a palpable tension continues to exist between our circuit's sovereign immunity jurisprudence and the Supreme Court's guidance on this issue. *See Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1191 (9th Cir. 2003) (O'Scannlain, J., concurring); *Hason v. Med. Bd. of Cal.*, 294 F.3d 1166, 1167 (O'Scannlain, J., dissenting from denial of rehearing en banc).

Although the Court held in *Lane* that Title II of the Americans with Disabilities Act validly abrogates state sovereign immunity in the context of courthouse access, that narrow holding was reached by a circumspect analysis that is significantly more exacting than that employed by our circuit in *Dare* and *Clark*. 124 S. Ct. at 1994. Indeed, the *Lane* Court placed significant emphasis upon the fact that courthouse access is a fundamental right that implicates not only disabled persons' entitlement to equal protection but also their due process rights and their rights under the First and Sixth Amendments. *See id.* at 1988. It is therefore open to question whether Title II validly abrogates state sovereign immunity where no such fundamental right is at issue. *See id.* at 1994 n.20. A State may well retain its Eleventh Amendment immunity where a plaintiff premises a Title II claim solely upon an alleged equal protection violation and has not suffered the deprivation of any other constitutional right. Because *Dare* and *Clark* upheld the entirety of Title II without engaging in the nuanced, case-by-case analysis demanded by *Lane*, their continued vitality is uncertain. In the absence of en banc review, however, I acknowledge that these decisions remain binding on this panel and thus join in the per curiam opinion.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BILLY RAY PHIFFER,

Plaintiff,

v.

CV 00-1652-BR

DEPARTMENT OF CORRECTIONS COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon public entity, and DEPARTMENT OF CORRECTIONS SANTIAM CORRECTIONAL INSTITUTION, a State of Oregon public entity,

OPINION AND ORDER

Defendants.

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BROWN, Judge.

This matter comes before the Court on Defendants' Motion for Judgment on the Pleadings (#14) as to Plaintiff's First and Second Claims. Plaintiff brought this action alleging Defendants failed to reasonably accommodate his disabilities while he was incarcerated. Plaintiff asserts three claims in his Complaint:

First – Unlawful Discrimination on the Basis of Disability in Violation of Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12132;

Second – Unlawful Discrimination on the Basis of Disability in Violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and

Third – Negligence under the Oregon Tort Claims Act (OTCA), Or. Rev. Stat. § 30.265.

Plaintiff seeks injunctive relief, damages, attorneys' fees, and costs. For the purpose of deciding Defendants' Motion, the Court will assume it has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(4), and 1367(a).

For the reasons that follow, Defendants' Motion for Judgment on the Pleadings is **DENIED**.

RELEVANT FACTUAL BACKGROUND[1]

[1] This factual summary is taken from Plaintiff's Complaint. For the purpose of Defendants' Motion, the Court has accepted Plaintiff's allegations as true and has drawn all inferences in favor of Plaintiff, the nonmoving party.

Plaintiff is a resident of Texas who formerly was incarcerated in Oregon. From July 1997 to November 1997 and from April 1998 to December 1998, Plaintiff was incarcerated at the Santiam Correctional Institution (SCI). From November 1997 to April 1998, Plaintiff was incarcerated at the Columbia River Correctional Institution (CRCI).

While at CRCI, Plaintiff was enrolled in the Transitional Mental Health Program. In March 1998, he was transferred to the Pathfinders Program. He was required to attend the Pathfinders Program from March 1998 through December 1998, during which time he was returned to SCI. Both the Transitional Mental Health Program and the Pathfinders Program are funded by the federal government.

During his incarceration, Plaintiff suffered from osteoarthritis and osteoporosis. He was unable to sit for the three-hour period, five times a week, required to participate in the Pathfinders Program. Plaintiff requested Defendants to return him to the Transitional Mental Health Program or, alternatively, to reasonably accommodate him for his disabilities. Defendants denied his requests. As a result, Plaintiff suffered severe physical pain while he was enrolled in the Pathfinders Program. Plaintiff contends Defendants were deliberately indifferent to the strong likelihood that their action and/or inaction violated Plaintiff's federally-protected rights.

STANDARDS

Pursuant to Fed. R. Civ. P. 12(c), any party may move for judgment on the pleadings after the pleadings are closed. For purposes of such a motion, the court accepts the nonmoving party's allegations as true and views all inferences in a light most favorable to the nonmoving party. *Doyle v. Raley's Inc.*, 158 F.3d 1012, 1014 (9th Cir. 1998) (citations omitted). A judgment on the pleadings is properly granted when, taking all allegations in the nonmoving party's pleadings as true, the

moving party is entitled to judgment as a matter of law. *See McGann v. Ernst & Young*, 102 F.3d 390, 392 (9th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997) (citation omitted). *See also Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999).

DISCUSSION

Defendants seek dismissal of Plaintiff's First and Second Claims. In support of their Motion, Defendants contend they are immune from private actions brought under Title II of the ADA and Section 504 of the Rehabilitation Act pursuant to the Eleventh Amendment because they are state government entities. Defendants acknowledge the United States Congress intended to abolish state immunity when Congress enacted the ADA and Section 504; nevertheless, Defendants argue the states are immune under the Eleventh Amendment because Congress exceeded its constitutional authority when it enacted those portions of the Acts.

A. Plaintiff's First Claim under Title II of the ADA

Plaintiff asserts in his First Claim that Defendants violated Title II of the ADA when they failed to reasonably accommodate him for his disabilities and compelled him to participate in the Pathfinders Program. Title II of the ADA provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The ADA defines "public entity" to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(B).

Defendants base their arguments on a recent decision by the United States Supreme Court in which the Court ruled Congress did not validly abrogate the states' sovereign immunity from actions brought in federal court by private claimants for money damages under Title I of the ADA.[2] *See Board of Trustees of University of Alabama v. Garrett,* 531 U.S. 356, 121 S. Ct. 955, 967-68 (2001). The Court held, therefore, actions brought in federal court by state employees to recover money damages for a state's failure to comply with Title I of the ADA are barred by the Eleventh Amendment. *Id.* Defendants maintain their Motion should be granted because the Court's rationale in *Garrett* applies equally to both of Plaintiff's claims.

Plaintiff counters Defendants' Motion should be denied. Plaintiff relies on *Pennsylvania Dept. of Corrections v. Yeskey* in which the Supreme Court held Title II of the ADA applies to state prisons. 524 U.S. 206, 209-10 (1998). Plaintiff argues the *Garrett* decision did not change the relevant, analytical framework for determining whether Congress validly nullified the states' Eleventh Amendment immunity from actions brought in federal court. Plaintiff also points out before and after *Garrett*, the Ninth Circuit held Congress validly abro-

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[2] Title I of the ADA addresses discrimination in employment and provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

gated state prisons' sovereign immunity from claims brought in federal court under Title II of the ADA and Section 504 of the Rehabilitation Act.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment also precludes citizens from bringing actions in federal court against their own states. *Garrett*, 121 S. Ct. at 962 ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.") (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000)). Nevertheless, pursuant to its enforcement powers in § 5 of the Fourteenth Amendment, Congress is authorized to abrogate the states' Eleventh Amendment immunity when Congress (1) unequivocally expresses an intent to do so, and (2) acts pursuant to a valid grant of constitutional authority. *Id. See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996).

There is no dispute Congress unequivocally expressed its intent to abrogate the states' immunity from liability for statutory violations when Title II of the ADA was enacted. 42 U.S.C. § 12202 provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State Court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter,

> remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Relying on *Garrett*, however, Defendants maintain Congress acted outside the permissible scope of its constitutional power when it abrogated the states' sovereign immunity for violations of Title II of the ADA. In § 5, the Fourteenth Amendment grants Congress the power to enforce "by appropriate legislation" the substantive guarantees set forth in § 1.[3] *See Garrett*, 121 S. Ct. at 963 (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

In *Garrett*, the Court concluded Title I of the ADA, which pertains to public employment, was not a valid exercise of Congress's power under § 5 of the Fourteenth Amendment. *Id.* at 968. The Court noted a state is not required to make special accommodations for the disabled if the state's conduct satisfies the minimum "rational-basis" review that courts apply to general social and economic legislation. *Id.* at 963-64. After an examination of the relevant legislative history, the Court determined Congress did not make a finding of "a pattern of irrational state discrimination in employment against

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[3] Section One of the Fourteenth Amendment provides:

> . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

the disabled." *Id.* at 965. Moreover, the Court found the rights and remedies created by Title I of the ADA were not congruent and proportional to any relevant constitutional violations identified by Congress. *Id.* at 966-68.

Defendants argue the Supreme Court's analysis applied to Title I in *Garrett* also applies to Title II. Defendants further assert this Court is bound to follow the Supreme Court's reasoning in *Garrett* and, therefore, must find Defendants immune from liability under Title II. Plaintiff argues the Court did not address Title II in *Garrett*; and, therefore, this Court must follow Ninth Circuit precedent set out in the cases discussed below in which the appellate court established Title II of the ADA is a valid exercise of Congress's constitutional power. The Court agrees with Plaintiff and rejects Defendants' arguments.

Before *Garrett*, the Supreme Court held Title II of the ADA "plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt." *Pennsylvania v. Yeskey,* 524 U.S. at 209 (emphasis in original). Without addressing the constitutional issues raised by Defendants in the case before this Court, the Supreme Court reasoned, "The text of [Title II of] the ADA provides no basis for distinguishing [state prison] programs, services, and activities from those provided by public entities that are not prisons." *Id.* at 210.

In *Garrett*, however, the Court expressly declined to "decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment." 121 S. Ct. at 960 n.1, 966 n.7. The Supreme Court has not determined after *Garrett* whether Title II of the ADA is constitutional; therefore, only Ninth Circuit decisions on that issue bind this Court. The Ninth Circuit has consistently ruled

Title II of the ADA is a valid exercise of Congress's power under § 5.

For instance, in *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), the plaintiffs were state inmates who sought injunctive relief under Title II of the ADA on the grounds they were discriminated against due to their developmental disabilities. The Ninth Circuit applied the two-part test set forth in *Seminole Tribe*, found Title II of the ADA to be a valid exercise of Congress's power under § 5 of the Fourteenth Amendment, and affirmed the district court's decision that the State of California was not immune from liability pursuant to the Eleventh Amendment. *Id.* at 1269-70.

In *Dare v. California*, the Ninth Circuit also held Title II of the ADA is "a congruent and proportional exercise of Congress's enforcement powers under § 5 of the Fourteenth Amendment that abrogated [the State of California's] Eleventh Amendment immunity." 191 F.3d 1167, 1175 (9th Cir 1999), *cert. denied*, 121 S. Ct. 1187 (2001). The court noted Congress "made extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face." *Id.* (citing 42 U.S.C. § 12101(a)). The court reasoned, therefore, "[W]e will not second-guess Congress's judgment that the ADA was targeted to remedy and prevent irrational discrimination against people with disabilities." *Id.* (internal quotations and citation omitted). After *Garrett*, without addressing constitutional issues, the court ruled Title II of the ADA "applies to state prisons." *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (citing *Yeskey*, 524 U.S. at 209).

Plaintiff also cites and relies on *Wroncy v. Oregon Department of Transportation,* No. 00-35356, 2001 WL 474550, at *1-2 (9th Cir. Apr. 9, 2001), a Ninth Circuit unpublished, post-*Garrett* decision. Plaintiff contends the Ninth Circuit af-

firmed *Clark* and *Dare* in *Wroncy*. Plaintiff further contends the Ninth Circuit did not reconsider its pre-*Garrett* decision because the Supreme Court expressly declined to reach the constitutionality of Title II in *Garrett*. Defendants point out *Wroncy* might have supported Plaintiff's position if it were a published opinion, but unpublished decisions of the Ninth Circuit are neither persuasive nor controlling authority. *See* 9th Cir. Rule 36-3. *See also Sorchini v. City of Covina*, 250 F.3d 706, 709 (9th Cir. 2001). Accordingly, this Court will not consider *Wroncy* or any other unpublished decision cited by Plaintiff.

In a post-*Garrett* decision, the Ninth Circuit held a claim against a California Senate Committee under Title V of the ADA was barred by the Eleventh Amendment. *See Demshki v. Monteith,* 255 F.3d 986, 988-89 (9th cir. 2001). Title V prohibits discrimination against any individual who opposes an "act or practice made unlawful" by the substantive provisions of the ADA. 42 U.S.C. § 12203(a). In *Demshki*, a former employee alleged he was unlawfully discharged for expressing concern over the Senate Committee's possible violation of relevant law pertaining to disabled job applicants. *Id.* at 987. The Ninth Circuit reasoned:

> We recognize that *Garrett* arose in the context of Title I, but we nevertheless conclude that the Court's holding necessarily applies to claims brought under Title V of the ADA, at least where, as here, the claims are predicated on alleged violations of Title I.

Id. at 988. The Ninth Circuit did not discuss or criticize its prior holdings in *Clark* or *Dare* nor did it address the constitutionality of Title II of the ADA. The *Demshki* decision, therefore, does not alter existing precedent in which the Ninth Circuit has held Title II of the ADA to be a valid exercise of

Congress's power. *See Dare*, 191 F.3d at 1174-75. *See also Clark*, 123 F.3d at 1270.

District courts cannot ignore controlling case authority even if it "appears to rest on reasons rejected in some other line of cases." *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057 (9th Cir. 2000) (circuit courts of appeal must follow precedential decisions by the United States Supreme Court), *petition for cert. filed*, 69 U.S.L.W. 3763, 70 U.S.L.W. 3035-36 (U.S. May 21, 200) (Nos. 00-1772, 00-1741, and 00-1754) (internal quotations and citations omitted). *See also Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1192 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998) (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). This Court must follow Ninth Circuit precedent. *See Yong v. Immigration and Naturalization Service (INS)*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) ("[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it . . . ."). *See also United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir.) (directly binding decisions must be followed, leaving to the higher court "the prerogative of overruling its own case decisions."), *cert. denied*, 121 S. Ct. 1503 (2001) (internal quotations and citation omitted). Accordingly, this Court finds Plaintiff's First Claim is not deficient as a matter of current law in this circuit, and Defendants are not immune from liability under Title II of the ADA pursuant to the Eleventh Amendment.

B. Plaintiff's Second Claim Under Section 504 of the Rehabilitation Act.

The parties agree the Court must evaluate a claim brought under Section 504 of the Rehabilitation Act by applying the same two-part test used to determine whether Congress properly abrogated state sovereign immunity when it enacted Title II of the ADA. Defendants concede Section 504 satisfies the first element because Congress clearly and unequivocally ex-

pressed its intention to abolish state immunity under the Eleventh Amendment. The Rehabilitation Act provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1). *See also Clark*, 123 F.3d at 1269 ("Congress has unequivocally expressed its intent to abrogate the State's immunity under . . . the Rehabilitation Act.").

The Ninth Circuit evaluated whether Congress acted pursuant to a valid exercise of power when it abrogated state immunity and held the Rehabilitation Act was "validly enacted under the Fourteenth Amendment." *Id.* at 1270. The Ninth Circuit reasoned, "Congress explicitly found that persons with disabilities have suffered discrimination", and "section 504 of the Rehabilitation Act is to prohibit discrimination against the disabled." *Id.*

In *Clark*, the Ninth Circuit also held a state's acceptance of Rehabilitation Act funds creates an express waiver of the state's immunity under the Eleventh Amendment in a discrimination action under Section 504 of the Rehabilitation Act. *Id.* at 1271.

Plaintiff alleges in his Complaint the Transitional Mental Health Program and the Pathfinders Program were wholly or partially funded through federal financial assistance. Viewing Plaintiff's allegations as true at this stage of the proceedings, the Court concludes Defendants waived any immunity available to them under the Eleventh Amendment when they accepted federal funds to operate these state programs. Accord-

ingly, Defendants' Motion to Dismiss Plaintiff's Second Claim Under Section 504 of the Rehabilitation Act is denied.

CONCLUSION

Based on the foregoing, Defendants' Motion for Judgment on

the Pleadings (#14) is **DENIED**.

IT IS SO ORDERED.

Dated this 17th day of September, 2001.

/s/Anna J. Brown

ANNA J. BROWN
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY RAY PHIFFER, an individual,

Plaintiff-Appellee,

v.

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity, et al.,

Defendants-Appellants.

No. 01-35984

D.C. No. CV-01-01652-AJB

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Submitted March 6, 2003**
Portland, Oregon

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: O'SCANNLAIN, FERNANDEZ, and FISHER, Circuit Judges

The State appeals the district court's denial of its motion for judgment on the pleadings based on Eleventh Amendment sovereign immunity. The facts and prior proceedings are known to the parties, and are restated herein only as necessary.

The denial of a state's motion for judgment on the pleadings on the grounds of Eleventh Amendment immunity is an interlocutory appeal and need not await final judgment. *See Clark v. California,* 123 F.3d 1267, 1269 (9th Cir. 1997) ("This court has jurisdiction to hear an interlocutory appeal from an order denying a state's motion to dismiss on the ground of immunity under the Eleventh Amendment." (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139 (1993))). The Respondent contends, however, that we must look at each case to determine whether the appeal involves a "serious and unsettled question of law." We disagree. We have never required such a showing for an interlocutory appeal of Eleventh Amendment immunity, *see, e.g., Thomas v. Nakatani*, 309 F.3d 1203, 1206-07 (9th Cir. 2002), nor has the Supreme Court, *see, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139 (1993), and we decline to require such a showing at this time. Accordingly, we have jurisdiction over the State's appeal.

Our precedent clearly commands the conclusion that the State is not entitled to Eleventh Amendment immunity under Title II of the ADA. *See, e.g., Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999); *Clark*, 123 F.3d at 1270. And, although the State makes a valiant attempt to persuade us that the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), requires us to revisit our precedent, we have already done so and have already rejected the State's claims. *See Hason v. Med. Bd. of*

Cal., 279 F.3d 1167, 1171, *reh'g en banc denied* 294 F.3d 1166 (9th Cir. 2002), *and cert. dismissed* 2003 WL 1792116 (U.S. April 7, 2003) (No. 02-479); *Thomas v. Nakatani*, 309 F.3d 1203, 1209 (9th Cir. 2002) (stating that *Hason* reaffirmed *Clark*'s and *Dare*'s holding that Congress abrogated sovereign immunity under Title II); *Lovell v. Chandler*, 303 F.3d 1039, 1050-51 (9th Cir. 2002) (same). We decline further review of our settled precedent.

Likewise, our precedent is clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds. *See, e.g., Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 820, *as amended*, 271 F.3d 910 (9th Cir. 2001), *and reh'g en banc denied*, 285 F.3d 1226 (9th Cir. 2002). Again, the State points to "intervening Supreme Court precedent," this time *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675-76 (1999), which it contends undermines our Eleventh Amendment waiver jurisprudence. Once again, we have already addressed the issue, reaffirming our precedent that a State waives Eleventh Amendment immunity by accepting federal funds. *Vinson v. Thomas*, 288 F.3d 1145, 1151 (9th Cir. 2002) (reaffirming *Douglas*'s holding that by accepting federal funds, a state waives its sovereign immunity); *Lovell*, 303 F.3d at 1051 (same). We find the State's claims without merit.

AFFIRMED and REMANDED.

MEMORANDUM CASES

No. 03-279. Columbia River Correctional Institute, et al., Petitioners v. Billy Ray Phiffer.

May 24, 2004. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Tennessee v. Lane, 541 US ___, 158 L Ed 2d 820, 124 S Ct ____ (2004).

(3)

No. 04-947

Supreme Court, U.S.
FILED
MAR 31 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

COLUMBIA RIVER
CORRECTIONAL INSTITUTE, et al.,

Petitioners,

v.

BILLY RAY PHIFFER,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, validly abrogates state sovereign immunity.

2. Whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, validly abrogates state sovereign immunity.

3. Whether states that receive federal funds validly waive their sovereign immunity against suits under Section 504 of the Rehabilitation Act that challenge disability-based discrimination in programs or activities that receive federal financial assistance.

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STATEMENT OF FACTS

1. Respondent Billy Ray Phiffer is a former inmate of the Oregon prison system. Pet. App. 8. He has osteoarthritis and osteoporosis. *Id.* In this case, Phiffer seeks relief for the state's failure to accommodate those disabilities during his incarceration. *Id.*

Beginning in March 1998, while Phiffer was incarcerated at the Columbia River Correctional Institute, the state required him to attend the Pathfinders Program. *Id.* Pathfinders is an "experiential learning" program that provides training in skills that will aid in community reentry following a prisoner's release from confinement. Oregon DOC Operations Division, *Programs*, available at http://www.oregon.gov/DOC/OPS/PRISON/scimccf_programs.shtml. The following month, the state transferred Phiffer to the Santiam Correctional Institute, but the state continued to require him to attend the Pathfinders Program until it returned him to Columbia River in December 1998. Pet. App. 8.

Participants in the Pathfinders Program are required to sit for a three-hour period five days per week. *Id.* Because of his disabilities, such extensive periods of sitting are extremely painful for Phiffer. See *id.* Phiffer asked the state to accommodate his disability within Pathfinders (through such means as providing him a padded chair in which to sit) or, in the alternative, to transfer him to the Transitional Mental Health Program, in which he had previously participated without experiencing undue pain. *Id.*[1] But the

[1] As the district court noted, "[b]oth the Transitional Mental Health Program and the Pathfinders Program are funded by the federal government." Pet. App. 8.

state denied these requests. *Id.* "As a result, Plaintiff suffered severe physical pain while he was enrolled in the Pathfinders Program." *Id.*

2. Phiffer filed this lawsuit in 2000 in the United States District Court for the District of Oregon. He contended that the state's failure to accommodate his disabilities violated Title II of the Americans with Disabilities Act (42 U.S.C. § 12132), which prohibits disability-based discrimination by state entities, and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), which prohibits disability-based discrimination by recipients of federal financial assistance. Pet. App. 7. He also contended that the state's conduct violated Oregon law. *Id.* Phiffer sought money damages from the state on each of these claims.

The state moved for judgment on the pleadings on the ADA and Section 504 claims. *Id.* It contended that sovereign immunity barred Phiffer's damages claims under these statutes. *Id.* at 9. The district court denied that motion. *Id.* at 6-18. The court noted that Congress expressly declared that states are not entitled to sovereign immunity against suits brought under the ADA and Section 504. *Id.* at 11-12, 17; see 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973. . . ."); *id.* § 12202 (ADA) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."). The court concluded that these statutes represented a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment and thus could validly abrogate state sovereign immunity. Pet. App.

13-17. The court further concluded that when Oregon accepted federal funds for the Transitional Mental Health Program and the Pathfinders Program it voluntarily "waived any immunity available to [it] under the Eleventh Amendment." *Id.* at 17.

The state took an interlocutory appeal, and the court of appeals affirmed in an unpublished memorandum. *Id.* at 19-21. The court first held that Title II of the ADA validly abrogated the state's sovereign immunity. *Id.* at 20-21. In so holding, the court of appeals relied on its own earlier precedents that had concluded that Title II was proper Section 5 legislation. See *id.* at 20 (citing *Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999), *cert. denied*, 531 U.S. 1990 (2001); *Clark v. California*, 123 F.3d 1267, 1270 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)). The state contended that those precedents were inconsistent with *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), in which this court held that Title I of the ADA – which prohibits disability-based discrimination in employment – was not proper Section 5 legislation. Pet. App. 20. But the court of appeals responded that it had "already rejected" the contention that *Garrett*'s holding extended to Title II of the ADA – which prohibits disability-based discrimination by public entities outside of the context of employment. Pet. App. 20.

The court of appeals then turned to the Rehabilitation Act claim. The court found its precedent "clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds." Pet. App. 21. As for the state's contention that intervening Supreme Court decisions had undermined that clear precedent, the court found the contention to be "without merit." *Id.*

3. The state sought certiorari in this court. While the state's petition for certiorari was pending, this court decided *Tennessee v. Lane*, 124 S. Ct. 1978 (2004). *Lane* held that ADA Title II is proper legislation to enforce the Fourteenth Amendment, and thus validly abrogates state sovereign immunity, at least insofar as the statute "applies to the class of cases implicating the accessibility of judicial services." *Id.* at 1993. This court then summarily granted the petition for certiorari in this case, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Lane*. Pet. App. 22. On remand, the court of appeals "conclude[d] that [its] initial resolution of this case [was] consistent with *Lane*'s holding." *Id.* at 2-3. The court accordingly reinstated its earlier judgment affirming the denial of the motion for judgment on the pleadings, and it reissued its earlier unpublished memorandum "in per curiam form without further amendment." *Id.* at 3. Judge O'Scannlain filed a separate concurrence; although he did not express disagreement with the panel's application of sovereign immunity principles to this case, he argued that the court's pre-*Lane* precedent – on which the panel relied in reaching its decision here – had failed to engage in a sufficiently "nuanced" analysis and thus was of "uncertain" vitality following *Lane*. *Id.* at 5.

REASONS FOR DENYING THE WRIT

Less than one year ago, this court held that Title II of the Americans with Disabilities Act was proper legislation to enforce the Fourteenth Amendment, and thus could abrogate state sovereign immunity, at least insofar as the statute "applies to the class of cases implicating the

accessibility of judicial services." *Tennessee v. Lane*, 124 S. Ct. 1978, 1993 (2004). In so ruling, the court noted that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 1989. The court further observed that "[t]his pattern of disability discrimination persisted despite several federal and state legislative efforts to address it." *Id.* at 1990. But rather than resolve the constitutionality of Title II in "its wide variety of applications, as an undifferentiated whole," *id.* at 1992, the court upheld that abrogation in the application before it and left for another day the question whether the statute may constitutionally be applied more broadly, see *id.* at 1992-1993.

Lane thus left it to the lower courts in the first instance to address the constitutionality of Title II's abrogation outside of the access-to-courts context. To date, only two courts of appeals – including the panel in the case under review – have weighed in on this question. Based on that limited experience, the state contends that *Lane* has changed nothing and that this court should grant certiorari again, scarcely a year later, to address the issue on which the court granted certiorari in *Lane*.

Such a step would obviously be premature. But even if the issue of Title II's validity under Section 5 of the Fourteenth Amendment warranted review at this time, this would not be an appropriate case in which to grant certiorari, because the court would likely be unable to reach the Title II issue. In addition to his ADA claim, Phiffer seeks relief under Section 504 of the Rehabilitation Act of 1973, from which both the substantive standards and the remedies afforded under ADA Title II are drawn. Under the

current circuit law in *every* circuit to have addressed the question, Oregon validly waived its sovereign immunity against Section 504 claims by accepting federal financial assistance. See Parts I & II, *infra*.

Because Phiffer's Section 504 claim will afford him all of the relief to which he is entitled under Title II, any ruling on the Title II claim will be effectively advisory. By contrast, *Goodman v. Georgia*, No. 04-1236 (petition for writ of certiorari filed March 9, 2005), and *United States v. Georgia*, No. 04-1203 (petition for writ of certiorari filed March 9, 2005), would offer the court an opportunity to address the Title II abrogation issue in a concrete factual setting in which the issue actually makes a difference to the outcome of the case. If the issue did warrant review, *Goodman* would be the proper case in which to grant certiorari.

I. THE ADA TITLE II ABROGATION ISSUE DOES NOT WARRANT THIS COURT'S REVIEW HERE

A. Revisiting the question presented in *Lane* would be premature

In its petition for certiorari, the state does not focus on any post-*Lane* split in the circuits regarding the Section 5 basis for Title II of the ADA. Instead, the state notes that "[*b*]*efore Lane*, the circuits were deeply divided" over the question, Pet. 10 (emphasis added), and asserts that "*Lane* did little, if anything, to mend the circuit split," Pet. 13. Accordingly, the state contends, the issue of Title II's constitutionality under Section 5 "warrants a grant of certiorari here, just as it did when this court granted certiorari in *Lane*." Pet. 14.

The state's argument might be in order if, in the less than one year since *Lane* was decided, courts of appeals had issued a rash of conflicting rulings on Title II's constitutionality. But, in fact, the state can point to only two court of appeals decisions, in addition to the decision under review, that even address *Lane*. One of those decisions, *Badillo-Santiago v. Naveira-Merly*, 378 F.3d 1, 5-6 (1st Cir. 2004), merely held that Title II validly abrogated state sovereign immunity in the access-to-courts context – the same context addressed in *Lane* itself. The state cannot identify any court of appeals to have disagreed with that holding – and, indeed, any court of appeals to do so would risk summary reversal by this court.

The other post-*Lane* court of appeals case cited by the state, *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), held that "Title II of the ADA, as applied in the Eighth-Amendment context to state prisons, fails to meet the requirement of proportionality and congruence." *Id.* at 1275. The scope of the *Miller* court's ruling is uncertain given that the court did not explain what it means to apply a statute "in the Eighth-Amendment context." But in any event, that case hardly warrants the state's conclusion that a circuit split persists and that "there is no reason to believe that the passage of time and further consideration of the decision in *Lane* will do anything to resolve it." Pet. 13.[2] In addition to the present case, this court remanded

[2] After the state filed its petition for certiorari, the Third Circuit issued its opinion in *Cochran v. Pinchak*, 2005 WL 589434 (3d Cir. Mar. 15, 2005), in which a divided panel held that Congress lacked Section 5 authority to extend Title II to prison cases that implicate only the constitutional prohibition on irrational discrimination. That decision, too, does not justify the state's conclusion that *Lane* has had no effect on the pre-existing split in the circuits.

six other ADA Title II abrogation cases to the courts of appeals for further consideration in light of *Lane*,[3] and numerous other Title II abrogation cases are pending at the trial and appellate levels.[4] The ultimate rulings of the courts of appeals in these cases will doubtless clarify whether and on what aspects of Title II's constitutionality this court's intervention is necessary. There is surely no need to rush to the state's conclusion that *Lane* clarified nothing, and that the preexisting circuit split was just as wide and deep the day after the court's decision in that case as the day before.

B. This is not a proper case in which to address the section 5 basis for Title II

Even if the constitutionality of Title II's abrogation did warrant this court's review again so soon after *Lane*, this would not be a proper case in which to grant review. In addition to his ADA claim, Phiffer also sought relief under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.

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[3] See *Spencer v. Early*, 125 S. Ct. 657 (2004); *Spencer v. Easter*, 124 S. Ct. 2386 (2004); *Parr v. Middle Tenn. St. Univ.*, 124 S. Ct. 2386 (2004); *Kiman v. New Hampshire Dep't of Corrs.*, 124 S. Ct. 2387 (2004); *Rendon v. Florida Dep't of Highway Safety & Motor Vehicles*, 124 S. Ct. 2387 (2004); *Feaster v. Florida Dep't of Health*, 124 S. Ct. 2387 (2004).

[4] The state itself cites four post-*Lane* district court decisions. See Pet. 12-13. For other recent district court cases applying *Lane* to determine the constitutionality of Title II's abrogation of state sovereign immunity, see *Ramirez-Zayas v. Puerto Rico*, 225 F.R.D. 396, 399 (D. P.R. 2005); *Simmang v. Texas Bd. of Law Examiners*, 346 F. Supp.2d 874, 881-883 (W.D. Tex. 2004); *Flakes v. Frank*, 322 F. Supp.2d 981, 982 (W.D. Wis. 2004); *Buchanan ex rel. Estate of Buchanan v. Maine*, 2004 WL 2457796 at *2-*3 (D. Me., Nov. 2, 2004); *Browdy v. Karpe*, 2004 WL 2203464 at *8 n.9 (D. Conn., Sept. 20, 2004); *McNulty v. Bd. of Educ.*, 2004 WL 1554401 at *3 (D. Md., July 8, 2004).

§ 794. The substantive requirements of Section 504 are virtually identical to those of Title II of the ADA.[5] And the remedies for violation of the two statutes are completely identical. Congress specifically directed that the "remedies, procedures, and rights" provided under Section 504 "shall be the remedies, procedures and rights" provided under Title II. 42 U.S.C. § 12133; see *Barnes v. Gorman*, 536 U.S. 181, 184-185, 189 n.3 (2002). Accordingly, Section 504 will provide Phiffer with all of the relief to which he would be entitled under Title II – and, indeed, the judgment of the court of appeals rests independently on each statute. See Pet. App. 3-4.

Whatever questions exist regarding the validity of the abrogation of state sovereign immunity under Title II, there can be no doubt that Congress has the power to authorize damages awards against state programs and activities covered by Section 504. As we explain below, every court of appeals to have addressed the issue has held that states validly waive their sovereign immunity against suits challenging discrimination under Section 504. Although there may be a conflict in the circuits regarding the validity of that waiver in a narrow class of cases, for reasons we also explain below that conflict is not implicated here. See Part II, *infra*. Under the law that

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[5] *Compare* 29 U.S.C. § 794 (prohibiting disability-based discrimination in programs or activities receiving federal financial assistance), *with* 42 U.S.C. § 12132 (prohibiting disability-based discrimination by any "public entity"); see 42 U.S.C. § 12134(b) (requiring Title II's implementing regulations to "be consistent with" Section 504's earlier implementing regulations); see also *Zukle v. Regents of the University of California*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) (citing cases recognizing that "[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act").

prevails in every circuit to have addressed the issue, Oregon validly waived its sovereign immunity against Phiffer's Section 504 claim.

For these reasons, the Title II abrogation issue is irrelevant to Phiffer's eventual recovery. Even if Title II did *not* validly abrogate state sovereign immunity, Section 504 would provide Phiffer with exactly the same relief he would have received under Title II. Accordingly, this is not an appropriate case in which to decide the Title II question. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ of certiorari as improvidently granted when the issue on which certiorari had been granted would have no effect on the outcome of the underlying case). Review of the Section 5 basis for Title II's abrogation "can await a day when the issue is posed less abstractly." *Id.*

If this court does believe that the Title II abrogation question demands immediate resolution, the twin petitions in *Goodman v. Georgia* and *United States v. Georgia*, *supra*, offer a far more promising opportunity to address it. Unlike Phiffer, the plaintiff in *Goodman* did not assert a claim under Section 504. Accordingly, the question whether ADA Title II validly abrogates state sovereign immunity is one of crucial importance to the *Goodman* plaintiff in a way that it is not to Phiffer. And *Goodman* arises on a full summary judgment record; to the extent that this court believes that addressing the Section 5 basis for Title II requires engagement with the facts of the particular case before it, the bare pleadings of this case

offer very little with which to work. This point takes on particular significance because a key aspect of the Eleventh Circuit's analysis in *Goodman* was its conclusion that Title II could not validly abrogate state sovereign immunity even in a case in which the state conduct that violated the statute also violated the plaintiff's constitutional rights. See *Goodman v. Ray*, No. 02-10168, slip op. (11th Cir. Sept. 16, 2004); see also *Miller*, 384 F.3d at 1276 n.34 (same). Because Phiffer does not contend that the state's conduct also violated his constitutional rights, a grant of certiorari here would leave the court unable to address that issue.

C. The decision of the court of appeals was correct

There is an additional reason why this court need not rush to grant certiorari in this case: The court of appeals correctly concluded that ADA Title II validly abrogated Oregon's sovereign immunity against Phiffer's suit. As the court of appeals observed, nothing in *Lane* – which *upheld* the Section 5 basis for Title II in the case before it – overturned that court's earlier conclusion that Title II is valid Section 5 legislation. See Pet. App. 3-4. Indeed, by recognizing that Title II was enacted "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic denials of fundamental rights," *Lane*, 124 S. Ct. at 1989, and that the problem "persisted despite several federal and state legislative efforts to address it," *id.* at 1990, *Lane* lent further support to that conclusion. As this court held in *Lane*, Title II responds to a "record of constitutional violations" that "include[s] judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the

widespread exclusion of persons with disabilities from the enjoyment of public services." *Id.* at 1992. That record, the court concluded, "far exceeds the record" that the court previously held sufficient to justify the Family and Medical Leave Act as Section 5 legislation. *Id.* (citing *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)).

But the decision of the court of appeals was correct even if Title II is not valid Section 5 legislation in *all* of its applications. This case arises in "the prison context, when the government's power [over an individual] is at its apex." *Johnson v. California*, 125 S. Ct. 1141, 1150 (2004). In that context at least, Title II is plainly a congruent and proportional response to actual and threatened violations of the Fourteenth Amendment; the statute thus satisfies the Section 5 test of *City of Boerne v. Flores*, 521 U.S. 507 (1997).

In the prison context, the state retains its general obligation under the Equal Protection Clause not to engage in arbitrary or irrational discrimination on the basis of disability. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447-450 (1985). As this court recently held, the right to be free from invidious discrimination "is not a right that need necessarily be compromised for the sake of proper prison administration." *Johnson*, 125 S. Ct. at 1150. Compliance by prisons with the Equal Protection Clause, this court declared, "is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system." *Id.*

But more is at stake in the prison context than simply the right to be free from arbitrary discrimination. As in the access-to-courts context addressed in *Lane*, application

of Title II to prisons implicates "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Lane*, 124 S. Ct. at 1988.[6] In particular, the Constitution imposes on states a series of affirmative obligations with respect to those in their custody. See *Deshaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 198 (1989) (recognizing that states have "affirmative duties of care and protection with respect to," *inter alia*, prisoners). The Eighth Amendment, as incorporated in the Fourteenth Amendment, requires states to "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Of particular importance to prisoners with disabilities, state officials violate the Constitution when they act with "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

And other provisions of the Constitution impose on states still further affirmative obligations in the prison context. For example, the First Amendment, as incorporated in the Fourteenth, requires states to provide prisoners with "meaningful access to the courts." *Lewis v. Casey*, 518 U.S. 343, 358 (1998) (state must provide prisoners) (internal quotation marks omitted). It also requires states to afford prisoners "reasonable opportunities" to exercise their religion. *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972). And pursuant to the Fourteenth Amendment's Due Process

[6] For this reason, the state is incorrect to contend that the application of Title II to Phiffer's case does not implicate any fundamental right. *Cf.* Pet. 13 n.3.

Clause, states must provide prisoners with procedural protections before engaging in conduct that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995); see *Vitek v. Jones*, 445 U.S. 480, 495-496 (1980) (state must provide procedural protections before transferring prisoner to a mental hospital).

Where prisoners with disabilities are concerned, states have frequently violated these constitutional rights. In *Lane* itself, this court noted that prior judicial decisions "document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system." *Lane*, 124 S. Ct. at 1989. And a long line of lower-court cases provides "confirming judicial documentation," *Board of Trustees v. Garrett*, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring), that this "pattern of unequal treatment" has also been a pattern of *unconstitutional* treatment. See *Lane*, 124 S. Ct. at 1989 n.11 (citing cases).[7] Given the affirmative obligations the Constitution imposes on states in their

[7] See also, e.g., *Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (denial of wheelchair to inmate with paralysis, resulting in inmate's inability to shower himself or leave his cell, violated Eighth Amendment); *Beckford v. Irvin*, 49 F. Supp. 2d 170, 180 (W.D.N.Y. 1999) (Eighth Amendment violation existed where plaintiff "was regularly deprived use of his wheelchair for extended periods of time, plaintiff was unable to shower, and . . . he was not allowed to use a cup in order to try to bathe by taking water out of his cell toilet or drinking fountain"); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1043 (S.D.N.Y. 1995) (denial of interpretive services and assistive devices to deaf inmates during medical treatment violated Eighth Amendment where "communication between the patient and medical personnel [was] essential to the treatment in question"); *Casey v. Lewis*, 834 F. Supp. 1569, 1582 (D. Ariz. 1993) (failure to provide accessible bathrooms, showers, and cells violated Eighth Amendment).

treatment of prisoners with disabilities, and the extensive history of state violations of those obligations, the conclusion the court reached in the access-to-courts context applies equally well here: "Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in [state prisons] cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Lane*, 124 S. Ct at 1994 (quoting *City of Boerne*, 521 U.S. at 532). The court of appeals thus was correct to conclude that Title II validly abrogated Oregon's sovereign immunity against Phiffer's claim.

II. THE QUESTION WHETHER SECTION 504 OF THE REHABILITATION ACT EXACTS A VALID WAIVER OF STATE SOVEREIGN IMMUNITY DOES NOT WARRANT THIS COURT'S REVIEW

A. This case does not implicate any conflict in the circuits concerning Section 504's waiver of sovereign immunity

Section 504 of the Rehabilitation Act applies to state agencies only insofar as they conduct "program[s] or activit[ies] receiving federal financial assistance." 29 U.S.C. § 794(a). When a state agrees to accept federal funds, Congress has provided that the state "shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation" of that statute. 42 U.S.C. § 2000d-7(a)(1). Taken together, these provisions declare that a state that accepts federal funds waives its sovereign immunity against Section 504 suits in its federally-financed programs and activities. Contrary to the state's contention that the

circuits are deeply split on the matter, Pet. 19-30, *every* court of appeals to have addressed the question has held that waiver to be valid under the principles articulated in cases such as *South Dakota v. Dole*, 483 U.S. 203, 210-212 (1987), and *College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board*, 527 U.S. 666, 686-687 (1999).[8]

The state points to the Second Circuit's decision in *Garcia v. S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98 (2d Cir. 2001).[9] But *Garcia* did not contest the basic point that states that accept federal funds validly waive their sovereign immunity against suits under Section 504. Instead, the court there focused on a narrower question. The court concluded that a state accepting funds could not have *knowingly* waived its sovereign immunity under Section 504 before 1996 and 1997, when this court decided *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *City of*

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[8] See *Pace v. Bogalusa City Sch. Bd.*, 2005 WL 546507 (5th Cir., Mar. 8, 2005); *Barbour v. Washington Metro. Transit Auth.*, 374 F.3d 1161, 1164-1170 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. ____ (Mar. 7, 2005); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128-130 (1st Cir. 2003); *Garrett v. University of Alabama at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1293 (11th Cir. 2003) (*per curiam*); *Koslow v. Pennsylvania*, 302 F.3d 161, 170-172 (3d Cir. 2002), *cert. denied*, 537 U.S. 1232 (2003); *Robinson v. Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003); *Nihiser v. Ohio E.P.A.*, 269 F.3d 626, 628 (6th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002); *Jim C. v. United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (*en banc*), *cert. denied*, 533 U.S. 949 (2001); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Clark*, 123 F.3d at 1271.

[9] The state also points to the panel's opinion in *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609, 615-616 (5th Cir. 2003), which applied a similar analysis to that of the Second Circuit in *Garcia*. But the Fifth Circuit subsequently took the case *en banc* and (after the state filed its petition for certiorari in this case) rejected the panel's analysis. See *Pace v. Bogalusa City Sch. Bd.*, 2005 WL 546507 (5th Cir. Mar. 8, 2005).

Boerne, *supra*. Before that time, the *Garcia* court argued, states had no reason to doubt the constitutionality of ADA's abrogation of state sovereign immunity and thus no reason to believe they were giving anything up under Section 504 when they accepted federal funds. See *Garcia*, 280 F.3d at 114-115 & n.4. Every court of appeals to have resolved the question following *Garcia* has rejected the Second Circuit's Section 504 waiver analysis. See *Pace*, 2005 WL 546507, slip op. 22 (concluding that "the *Garcia* approach is problematic for a number of reasons" and rejecting it); *Barbour*, 374 F.3d at 1166-1168 (noting that "[n]o other circuit has accepted" the *Garcia* analysis, and "likewise reject[ing] it"); *Nieves-Marquez*, 353 F.3d at 130 ("we reject this reasoning [of *Garcia*], as have three other circuits"); *Doe v. Nebraska*, 345 F.3d 593, 601-604 (8th Cir. 2003) (detailing reasons why the *Garcia* analysis is wrong); *Garrett*, 344 F.3d at 1292-1293 (rejecting *Garcia* analysis); *A.W. v. Jersey City Pub. Schs.*, 341 F.3d 234, 244 (3d Cir. 2003) (same).

For reasons we explain below, the conflict in the circuits regarding the *Garcia* waiver analysis does not warrant this court's review. But even if it did, this case would not be an appropriate one in which to grant review, because this case simply does not implicate that conflict. Crucial to the Second Circuit's analysis in *Garcia* was that the state conduct at issue occurred during the period from 1993 to 1995 – before *Seminole Tribe* and *Boerne* suggested that the abrogation of state sovereign immunity under ADA Title II might be unconstitutional. See *Garcia*, 280 F.3d at 114 n.4. The court concluded that in the pre-*Seminole*, pre-*Boerne* period, "even the most studied scholar of constitutional law would have had little reason to doubt the validity of Congress's asserted abrogation of

New York's sovereign immunity as to private damage suits under Title II," *id.*; as a result, the state could not have known that it was actually giving up anything under Section 504 when it accepted federal funds during that period.

But this case involves conduct that occurred beginning in March 1998, nearly two years after *Seminole Tribe* and nearly a year after *Boerne*. See Pet. App. 8. Indeed, on March 4, 1998, the attorneys general of 34 states filed a brief in this court which argued that – at least in the prison setting – Congress lacked power to abrogate state sovereign immunity against ADA Title II claims. See Brief for Nevada *et al.* as *amici curiae*, *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998). By the terms of *Garcia*'s own analysis, the state clearly had at least "a colorable basis . . . to suspect" that Title II's abrogation might be invalid. *Garcia*, 280 F.3d at 114 n.4. The state thus could not have been "ignorant of the fact that it was waiving its possible claim to sovereign immunity" under Section 504 by accepting federal funds. *Id.* Even under *Garcia*, then, Oregon's waiver of sovereign immunity was valid in this case. As a result, this case does not fairly present the question over which the circuits may be in conflict.

B. The validity of Section 504's waiver of sovereign immunity does not warrant this court's review in any event

Even if this case did raise the issue that has divided the circuits, the question of the validity of Section 504's waiver of state sovereign immunity would not warrant this court's review. The court has repeatedly denied petitions for certiorari raising that question – including at

least once this Term. See *Washington Metro. Area Transit Auth. v. Barbour*, 125 S. Ct. ____ (March 7, 2005) (No. 04-748); *Pennsylvania Dep't of Corr. v. Koslow*, 537 U.S. 1232 (2003) (No. 02-801); *Hawaii v. Vinson*, 537 U.S. 1104 (2003) (No. 01-1878); *Chandler v. Lovell*, 537 U.S. 1105 (2003) (No. 02-545); *Ohio EPA v. Nihiser*, 536 U.S. 922 (2002) (No. 01-1357); *Kansas v. Robinson*, 539 U.S. 926 (2003) (No. 02-1314); *Arkansas Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001) (No. 00-1488). The same course is appropriate here.

1. *The Waiver Decision of the Court of Appeals Was Correct* – The court of appeals was correct to hold that Oregon validly waived its sovereign immunity against Phiffer's Section 504 suit by accepting federal funds for the Pathfinders and Transitional Mental Health Programs. As noted above, every circuit to have addressed the question has concluded that Section 504's waiver satisfies both the requirements for conditional-spending legislation set forth in such cases as *South Dakota v. Dole*, *supra*, and the requirements for waivers of sovereign immunity set forth in such cases as *College Savings Bank*, *supra*. Contrary to the state's suggestion, Pet. 22-23, this Court recognized in *College Savings Bank*, 527 U.S. at 678-679 n.2, 686-687, that Congress may use its conditional-spending power to extract a waiver of a state's sovereign immunity. Section 504's waiver is directly related to the federal interest in assuring that federal funds do not subsidize or facilitate discrimination. *Cf. South Dakota v. Dole*, 483 U.S. at 207 ("conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs") (internal quotation marks omitted). And the waiver is voluntary: A state may retain its sovereign immunity for a given

"program or activity" simply by foregoing federal funding for it; such a choice may be "politically painful," but it is not coercive. *Jim C.*, 235 F.3d at 1082.

The Second Circuit agreed in *Garcia* that Section 504's abrogation provision, 42 U.S.C. § 2000d-7(a)(1), "constitutes a clear expression of Congress' intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Garcia*, 280 F.3d at 113. But it held that even such a clear expression was insufficient to effect a waiver. The crucial question, to the *Garcia* court, was "whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful." *Id.* at 115 n.5. Unless the state knew it had immunity to give away, the court concluded, it could not have intentionally relinquished a known right and thus could not have waived its sovereign immunity. See *id.* at 114.

That conclusion – which has been rejected by every other circuit to confront it – misapprehends this court's precedents in both the conditional-spending and sovereign immunity areas. This court has made clear that the requirement that states "know" the conditions attached to federal funds is an objective one, which merely demands "that Congress speak with a clear voice." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."). And this court has recently emphasized that the identification of a waiver of sovereign immunity cannot turn on subjective motivations: "Motives are difficult to evaluate, while jurisdictional rules should be

clear." *Lapides v. Board of Regents*, 535 U.S. 613, 621 (2002); see also *id.* at 620 ("The relevant 'clarity' here must focus on the litigation act the State takes that creates the waiver. And that act – removal – is clear.").

Garcia's conclusion is also inconsistent with this court's precedents governing waiver of other constitutional rights. This court has repeatedly held that an individual can effect a "knowing" waiver of a constitutional right even if he or she does not understand all of the practical consequences of his or her decision. All that matters is that the individual understand the direct legal consequences of giving up the right. See, e.g., *Colorado v. Spring*, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege."). Section 504's waiver provision plainly satisfies that standard, for it makes absolutely clear that acceptance of federal funds entails a waiver of Eleventh Amendment immunity against suits brought under the statute. See 42 U.S.C. § 2000d-7(a)(1). The fact that some state officials might have erroneously believed that waiving the state's immunity against Section 504 claims had no *practical* consequence did not deprive the state of knowledge of the clear and direct *legal* consequence that immunity against Section 504 claims was, in fact, waived.

2. *The Waiver Question Raises No Issue of Continuing Significance* – In any event, the conflict in the circuits created by *Garcia* is of rapidly diminishing significance and may no longer be a live conflict at all. *Garcia* was decided before this court's decision in *Lapides*, *supra*, which fatally undercut the Second Circuit's emphasis on the subjective knowledge and understanding of the states.

Since *Lapides*, every circuit to have resolved the question has rejected the *Garcia* analysis. See Part II-A, *supra*.

And *Garcia*'s rule applies only to cases that involve conduct that occurred during a very narrow time period. Under the *Garcia* rule, the acceptance of federal funds *prior* to the 1992 effective date of the ADA effected a valid waiver of a state's sovereign immunity against Section 504 claims; and at least by the time of this court's 1997 decision in *City of Boerne*, *supra*, the acceptance of federal funds again effected a valid waiver of a state's sovereign immunity against Section 504 claims. See Part II-A, *supra*. The *Garcia* rule thus applies only with respect to Section 504 claims that arose during the five-year period beginning in 1992 and ending in 1997. That is surely a small – and increasingly smaller – class of cases. Even if this case did implicate the disagreement in the circuits occasioned by *Garcia*, there would be no reason for this court to intervene.

III. THE QUESTION WHETHER SECTION 504 VALIDLY ABROGATES STATE SOVEREIGN IMMUNITY IS PURELY ACADEMIC

The state also asks this court to resolve a purported conflict over whether Congress validly *abrogated* state sovereign immunity against claims brought under Section 504. Pet. 14-19. But that question is purely academic. Because it is clear that states that receive federal funding *waive* their sovereign immunity against Section 504 claims involving federally funded programs or activities, see Part II, *supra*, there is no need for a separate analysis into whether the statute validly *abrogates* sovereign immunity as well. Even if Congress lacked the power to abrogate state sovereign immunity against claims brought

under Section 504, the state's waiver of its immunity renders that conclusion irrelevant. This court's review of the abrogation question is therefore unwarranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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(2)

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IN THE

Supreme Court of the United States

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity, et al.,

Petitioners,

v.

BILLY RAY PHIFFER, an individual,

Respondent.

Petition for Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

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REPLY BRIEF

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I. The Title II/Eleventh Amendment issue warrants this Court's review.

Petitioners ask this Court to issue a writ of certiorari to review three questions: (1) whether Congress validly abrogated the States' Eleventh Amendment immunity to private damages claims brought under Title II of the Americans with Disabilities Act when a claim is based on alleged disability discrimination and not on the deprivation of any fundamental right; (2) whether Congress validity abrogated the States' Eleventh Amendment immunity to private damage claims brought under Section 504 of the Rehabilitation Act; and (3) whether a State's waiver of immunity under Section 504, by accepting federal funds, requires that the State's waiver must be knowing and voluntary, or whether instead it is sufficient that Congress clearly express its intent to require waiver as a condition for the receipt of federal funds. Respondent's first rejoinder is that the Title II abrogation issue does not warrant this Court's review in this case because it is premature to consider the question so soon after *Tennessee v. Lane*,[1] because this is not a "proper case" in which to address the Eleventh Amendment/Title II issue,[2] and because the Ninth Circuit Court of Appeals decision was correct. None of those points should prove telling or should dissuade this Court from reviewing the important issues raised by petitioners.

A. *Tennessee v. Lane* did not resolve the Title II issue presented here or mend the circuit split on that issue.

The petition filed in this case describes the pre-*Lane* circuit split over the issue of whether Congress validly abrogated the States' sovereign immunity to private claims for damages

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[1] 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).

[2] (Opp. Br. 8).

brought under Title II of the ADA, with four circuits having held that, as a general matter, there was no valid abrogation, two taking less categorical positions, and one – the Ninth Circuit – standing alone in its position that States have no immunity to such claims, irrespective of the nature of the claim or the source of the right allegedly impacted. (Pet. Cert. 10-11). Respondent replies that it is too soon after *Lane* to consider the issue.

But *Lane* resulted in a narrow holding that did not decide whether Congress validly abrogated the States' Eleventh Amendment immunity outside of the context of the fundamental right of access to the courts. *See Cochran v. Pinchak*, 401 F.3d 184, 2005 U.S. App. LEXIS 4261, *3 (3d Cir. 2005) (in *Lane*, "[t]he Court was very specific in limiting its holding to cases implicating the fundamental right of access to the courts, indicating that an individual analysis would have to be performed for subsequent Title II cases involving a different scenario"); *Scott v. Androscoggin County Jail*, 866 A.2d 88, 94 (Me. 2004) (in *Lane*, the "Court left open the issue of whether immunity is abrogated in cases implicating statutory violations or other constitutional rights" than the right of access to courts); William D. Araiza, "The Section 5 Power After *Tennessee v. Lane*," 23 Pepperdine L. Rev. 39, 62 (2004) (in *Lane*, the Court "limit[ed] its holding to Title II's applicability to judicial access") (footnote omitted). Because the holding in *Lane* is so limited, there is no reason to suppose that the pre-existing circuit split will mend itself in *Lane*'s wake.

And indeed there is no sign that the split is narrowing. Respondent has not cited any case, and petitioners have not found any, in which, outside of the context of access to courts, any court has changed its pre-*Lane* position regarding the validity of the abrogation of State sovereign immunity to Title II damage claims. The Ninth Circuit's stubborn refusal to even

rethink its position on remand following *Lane* in this case is a good example of how little impact *Lane* is apt to have, and has had, on the broader issue of the validity of the abrogation outside of the context of the right of access to the courts or of other fundamental rights.

Not only is the divergence between the circuits on these issues not narrowing, it appears to be widening. Now there even is a split over the more specific issue presented here: whether the States retain sovereign immunity to damage claims based on disability discrimination that are brought by former prisoners. *Compare Phiffer v. Columbia River Correctional Inst.*, 384 F.3d 791 (9th Cir. 2004) (State's sovereign immunity abrogated no matter the basis of the former inmate's claim) *with Miller v. King*, 384 F.3d 1248, 1274-75 (11th Cir. 2004) (no valid abrogation with regard to claims based on the Eighth Amendment), *and Cochran v. Pinchak*, 401 F.3d 183, 2005 U.S. App. LEXIS 4261, *20-24 (3d Cir. 2005) (no valid abrogation with regard to claims based on equal protection).

Thus, there is no reason to wait. The holding in *Lane* was narrow and limited; the case did not resolve the significant issue presented here; and the circuit split remains and appears to be widening.

B. The Title II abrogation issue is squarely presented here and is properly before the Court.

Respondent contends that, even if it is not too soon after *Lane* to consider the Title II issue, "this would not be a proper case in which to grant review." (Opp. Br. 8). That is so, respondent asserts, because in this case he also seeks relief under Section 504 of the Rehabilitation Act, which will provide him "with all of the relief to which he would be entitled under Title II[.]" (Opp. Br. 9). Rather than issuing a writ in this case, respondent urges the Court, if it wishes to review the

Title II issue, to grant certiorari instead in *United States v. Goodman* (04-1203) and in *Goodman v. Georgia* (04-1236), where no Section 504 claim is present.

The presence of a Section 504 claim in this case is a reason why this Court should issue a writ, not a reason why it should not. In the petition, petitioners have outlined the circuit split over the significant issue of whether Congress properly abrogated the States' sovereign immunity to damage claims brought under Section 504. (Pet. Cert. 14-19). Petitioners also have asked the Court to review another issue that, although admittedly limited in the number of cases that it might impact directly, can be analytically pivotal in Eleventh Amendment cases where waiver of a State's immunity is at issue. That issue is whether, for the waiver to be valid, a State must knowingly and voluntarily waive, by its acceptance of federal funds, its constitutionally protected immunity, or whether it is instead sufficient if Congress clearly expresses its intent to require waiver as a condition for the receipt of federal funds. In this case, despite Congress's clear statement requiring waiver, the State contends that it had every reason, based on case law, to believe that it had no immunity to waive. Thus, its waiver was not a knowing one. On that issue, the parties take directly opposing positions.

The fact that respondent could obtain under Section 504 "all of the relief to which he would be entitled under Title II" (Opp. Br. 9) presupposes that the State has waived its sovereign immunity here, which is one of the issues petitioners ask this Court to review. Thus, that fact is no impediment to review.

The fact that the *Goodman* case is before the Court also does not counsel against a grant of a writ here. Resolution of the broader Title II issue presented here has proved elusive. *See, e.g., Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, *reh'g en banc denied*, 294 F.3d 1166 (9th Cir. 2002), *cert. dismissed*,

538 U.S. 958 (2003). For that reason, it might be prudent to grant review in both cases, rather than to choose between them. If a choice must be made, respondent suggests that the choice should be *Goodman* because it "arises on a full summary judgment record." (Opp. Br. 10). But the existence of a factual record, as opposed to review of respondent's complaint only, might well be a reason to prefer this case over *Goodman*. The issues, after all, are legal ones, not factual.[3]

Respondent also suggests that *Goodman* is the better vehicle for review because he does not contend that the State's conduct violated his constitutional rights. (Opp. Br 11). It is impossible to square that assertion with his latter claim that "fundamental right[s]" are at issue here. (Opp. Br. 13 n. 6). Particularly after *Lane*, it also is difficult to believe that respondent does not base his claim on the Equal Protection Clause, as well as on Title II itself.

C. No fundamental rights are involved in this case.

Respondent appears to suggest that because the events that led to this case took place when he was in prison, his claim is entitled to some kind of heightened scrutiny. (Opp. Br. 12-13). He notes, for example, that "[t]his case arises in 'the

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[3] In its petition filed in *Goodman*, the United States suggests that case is the preferable choice because in *Phiffer* the government was not notified "that a challenge to Title II's constitutionality was pending and, as a result, the United States did not participate in that case in defense of Title II below." (*Goodman* Pet. Cert. 17-18). That claim borders on the disingenuous. When *Phiffer* first was before the Ninth Circuit, it was submitted to the same panel on the same day as *Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003). The United States participated in that case and sent an attorney from Washington D.C. to argue it. In addition, both times the State has filed petitions seeking certiorari in *Phiffer* it has served those petitions on the United States.

prison context, when the government's power [over an individual] is at its apex,'" (Opp. Br. 12, quoting *Johnson v. California*, 125 S. Ct. 1141, 1150 (2004)), and he claims that, "[i]n that context at least, Title II is plainly a congruent and proportional response to actual and threatened violations of the Fourteenth Amendment." Respondent has it exactly backwards.

"[P]rison administration is a task that has been committed to the responsibility of the legislative and executive branches. Separation of powers considerations counsel a policy of judicial restraint in prisoners' rights cases." *Cochran*, 2005 U.S. App. LEXIS at * 19, citing *Turner v. Safley*, 482 U.S. 78, 85 (1987). "In *Turner*, the Court held that 'when a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'" *Id.*, citing *Turner*, at 89. It is the disparity between that deferential standard of review and what Title II requires that demonstrates that Title II is not a congruent and proportional response. *Id.* at *23 ("Title II's obligation to include 'disabled' prisoners in all 'services, programs, or activities' conflicts with the States' right to impose classifications on disabled prisoners").

Respondent also suggests that some form of fundamental right is implicated in this case, although he gives no hint as to what that right might be. (Opp. Br. 13 n. 6). In fact, no such right is involved. Respondent simply has claimed that the State failed reasonably to accommodate his alleged disabilities when he participated in programs while in prison.

II. The waiver and Section 504/Eleventh Amendment issues merit review.

A. Contrary to respondent's contention, this case does implicate a conflict in the circuits regarding waiver of sovereign immunity to Section 504 claims.

Respondent contends that this case "does not implicate any conflict in the circuits concerning Section 504's waiver of sovereign immunity." (Opp. Br. 15). Yet respondent admits that there is a split between the Second Circuit's decision in *Garcia v. S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98 (2d Cir. 2001), and decisions rendered by other circuits. (Opp. Br. 16-17). And, although as respondent notes, the *en banc* Fifth Circuit decision in *Pace v. Bogalusa City Sch. Bd.*, ___ F.3d ___, 2005 U.S. App. LEXIS 3926 (2005), reversed the panel decision on which petitioners have relied, the deep division in the *en banc* court only serves to underscore the analytical tension between waiver analysis and Spending Clause authority that petitioners ask this court to review. In their petition, petitioners argued that this Court's statements regarding the requirement that a State's waiver of its sovereign immunity must be knowing and voluntary, and the Court's statements about the extent of Congress's Spending Clause authority, "have drawn courts in opposite directions and, thus appear to have led, at least in part, to the circuit split." (Pet. Cert. 20). Or, as Judge O'Scannlain put it in a decision dissenting from the denial of rehearing *en banc*, "[e]ach doctrine pulls [a court] in an opposite direction." *Douglas v. California Dept. of Youth Auth.*, 285 F.3d 1226, 1226 (9th Cir. 2002) (O'Scannlain, J., dissenting). The majority and dissenting decisions in *Pace* provide a striking example of that tension.

In *Pace*, the eight-judge majority gave lip service to the requirement that a State's waiver of its sovereign immunity must be knowing and voluntary, but the majority then substituted the expression of *Congress's* intention that a State waive

its immunity for any knowing and voluntary waiver *made by the State*. The majority held that "the only 'knowledge' that the Court is concerned about is a state's knowledge that a Spending Clause condition requires waiver of immunity, not a state's knowledge that it has immunity it could assert." *Pace*, 2005 U.S. App. LEXIS at *17. That holding is contrary to this Court's statement in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 680-81 (1999), that "[t]here is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." The holding also is at odds with the Second Circuit's decision in *Garcia*. Furthermore, as the six judges who dissented from that holding in *Pace* observed, the court's decision is in conflict with waiver analysis generally, including the doctrine that "'waiver must be made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Pace*, at * 79, (Jones, J., concurring in part and dissenting in part) quoting *Moran v. Burbine*, 473 U.S. 412, 421 (1986). The dissenting judges posed this analogy:

> the police instruct a criminal defendant, "for his own good," to sign a waiver of counsel form, while telling him that the waiver is "meaningless, because you have no counsel rights to waive." Who would argue that the waiver is knowing, especially if the police showed him a court decision confirming this view? That the dupe is an individual defendant rather than the State does not, per *College Savings*, make this a different case, nor does the fact that the waiver falls under the Spending Clause rather than some other type of enact-

> ment. The majority's opinion violates *College Savings Bank.*

Pace at * 92.

Here, it also was the State that was duped. In 1997 and 1998, when respondent was an inmate in the State's prisons, even *Garrett* had not yet been decided,[4] and the State faced binding precedent from the Ninth Circuit holding that it had no sovereign immunity to waive, as the State still does today. *See, e.g. ,Clark v. California*, 123 F.3d 1267, 1269 (9th Cir.1997).[5]

B. The waiver issue is a significant one, and the question of whether Section 504 validly abrogates States' immunity is not "purely academic," as respondent suggests.

Respondent argues that the waiver issue presented here is of little significance because it will impact only a few cases that arose "during a very narrow time period." (Opp. Br. 22). As noted above, the time period may not be as limited as respondent suggests. In all events, admittedly it is not the number of cases that will be directly affected that makes the waiver issue presented here a significant one. It is instead the fundamental tension between waiver analysis and Spending Clause jurisprudence that warrants this Court's attention. That is an issue that is not limited to any one set of cases.

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[4] *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

[5] Respondent argues that the State must have known that it had immunity to waive because *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), had been decided. (Opp. Br 16-18). But those cases did not settle the immunity issues raised here, which still have not been finally resolved by this Court.

The issue of whether Congress validly abrogated State sovereign immunity is not "purely academic." (Opp. Br. 22). Respondent contends that it is based on his assumption that the State waived its immunity. But the validity of that waiver and whether it was knowing and voluntary is an issue that is before the Court.

CONCLUSION

For the reasons discussed in the petition for a writ of certiorari, as well as those discussed above, petitioners respectfully request that this Court grant the petition for writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

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